TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 587.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

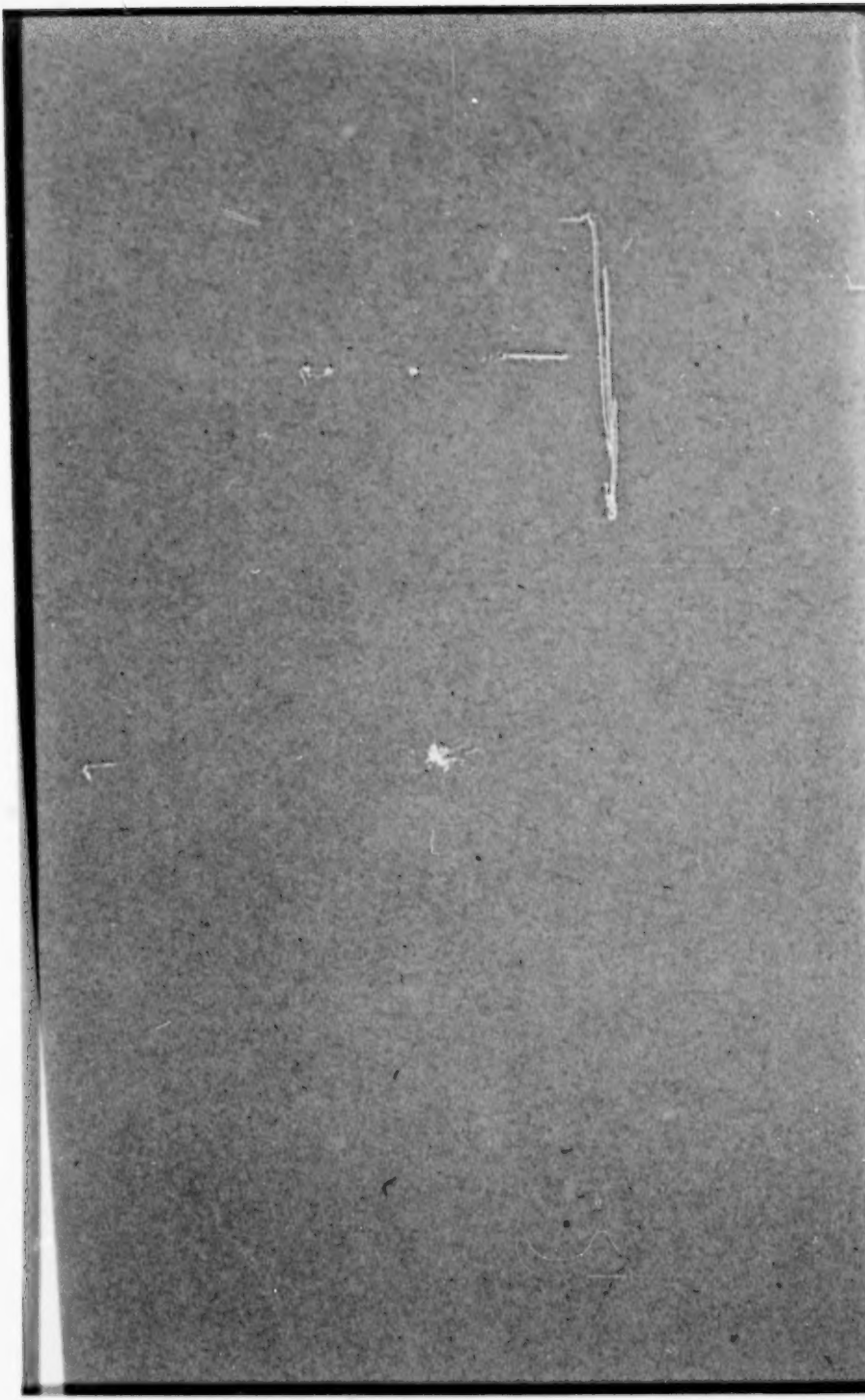
vs.

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED FEBRUARY 7, 1906.

(20,089.)



(20,089.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 587.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Caption	a	1
Papers on appeal	1	1
Notice of application for an order for a writ of certiorari and for writ	1	1
Order of comptroller, September 11, 1905	3	2
Petition for writ of certiorari	5	2
Exhibit One—Report of the New York Central and Hudson River Railroad Company for year ending October 31, 1903	21	11
Two—Application of the New York Central and Hudson River Railroad Company to the comptroller for resettlement	25	13
Three—Undertaking for costs	36	19
Order for issuance of writ of certiorari	40	21
Writ of certiorari	42	22
Return to writ of certiorari	45	23

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 20, 1906.

	Original.	Print.
Hearing before the comptroller	48	25
Testimony of J. H. Foulds, Jr	52	27
F. E. Williamson	69	38
Exhibit —Memorandum, signed by Foulds and Williamson, furnished at request of comptroller	85	46
1—Code of Car Service Rules of American Railway Association	88	48
A—Relator's memoranda, apparent basis of original assessment	108	6
B—Statement of car movements	109	6
B-1—Statement of car movements	110	6
C—Statement of car movements	111	6
C-1—Excerpts, constitution and statutes of Massachusetts	118	6
Case, Att'y Gen'l *vs.* Bay State Mining Co., 99 Mass., 148	126	7
Case, Att'y Gen'l *vs.* West. Un. Telegraph Co., 33 Fed. Rep., 129	134	7
Case, West. Un. Teleg. Co. *vs.* Att'y Gen'l, 125 U. S., 530	139	8
Exhibit D—Excerpts, statutes of New Jersey	170	10
E—Excerpts, statutes of Pennsylvania	196	11
F—Case, Commonwealth *vs.* Del., Susq. & Schuyl. R. R. Co., 14 C. C. Rep., 440	206	12
Case, Pullman Co. *vs.* Commonwealth, 107 Pa. St., 156.	215	12
Case, Pullman Co. *vs.* Pennsylvania, 141 U. S., 18	223	13
Case, Commonwealth *vs.* Del., L. & W. R. R. Co., 145 Pa. St., 96	237	13
Case, Commonwealth *vs.* N. Y., P. & O. R. R. Co., 188 Pa. St., 169	249	14
Exhibit G—Statement of car movements	282	16
Stipulation waiving certification of record	286	16
Order of appellate division	287	16
Affidavit of no opinion in appellate division	289	16
Notice of appeal to court of appeals	290	16
Stipulation waiving certification of record	291	16
Judgment	292	16
Memorandum of no opinion	295	16
Assignment of errors	297	16
Petition for writ of error	309	16
Allowance of writ of error	319	16
Bond on writ of error	321	16
Writ of error	326	16
Citation	329	16
Return to writ of error	331	16

a

In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Papers on Appeal from Order.

Proceedings for 1903.

Ira A. Place, Attorney for Appellant, Grand Central Station, Borough of Manhattan, N. Y. City, N. Y.
Julius M. Mayer, Attorney-General, Attorney for Respondent, Capitol, Albany, N. Y.

1 *Notice of Application for an Order for a Writ of Certiorari and for Writ.*

Supreme Court, Albany County.

Tax of 1903.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

SIR: Please take notice that a motion will be made by and on behalf of The New York Central and Hudson River Railroad Company, at a Special Term of the Supreme Court in and for the County of Albany, to be held at the City Hall in the City of Albany, N. Y., on the 30th day of September, 1905, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order for a writ of certiorari, and also for a writ of certiorari, to be directed to you, to review the determination of the Comptroller of the State of New York, dated September 11, 1905, a copy of
2 which is hereto annexed, to be returnable according to law, and for such other and further relief as may be proper.

Dated New York, September 18, 1905.

Yours, etc.,
IRA A. PLACE,
Attorney for Applicant, The New York Central and Hudson River Railroad Company.

Room 417, Grand Central Station, Borough of Manhattan, New York City, N. Y.

To Hon. Otto Kelsey, Comptroller of the State of New York, Albany, N. Y.

3 STATE OF NEW YORK:

COMPTROLLER'S OFFICE,
ALBANY, *Sept.* 11*th*, 1905.

In the Matter of the Application of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision of Taxes Assessed Against it, Under Chapter 908, Laws 1896, and the Acts Amendatory Thereof.

An application having been made by the above-named New York Central and Hudson River Railroad Company for a revision and resettlement of the taxes assessed and determined against it by the Comptroller of the State of New York, for the one year ending October 31, 1903, and the said Comptroller having heard the proofs offered on behalf of the said New York Central and Hudson River Railroad Company, in support of said application, and after due consideration thereof, the Comptroller does hereby determine that the amount of capital stock of the New York Central and Hudson River Railroad Company employed by the New York Central and Hudson River Railroad Company within this State for the year ending October 31, 1903, including the value of its tangible
4 assets, good will and franchises, was $122,535,265.99, and the assessment heretofore made against the said New York Central and Hudson River Railroad Company for the sum of one hundred eighty-five thousand seven hundred thirty-five and 7/100 dollars should be revised to the sum of one hundred eighty-three thousand eight hundred two and 90/100 dollars, which said sum of one hundred eighty-three thousand eight hundred two and 90/100 dollars is hereby determined as the amount which said New York Central and Hudson River Railroad Company was liable to pay under the provisions of Chapter 908, Laws of 1896, and the acts amendatory thereof for the one year ending October 31, 1903.

OTTO KELSEY, *Comptroller.*

5 *Petition for Writ.*

Supreme Court, Albany County.

(Tax of 1903.)

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

To the Supreme Court of the State of New York:

The petition of The New York Central and Hudson River Railroad Company respectfully shows:

I. This petitioner, The New York Central and Hudson River Railroad Company, is a domestic railroad corporation, having but

one kind of capital stock, organized and existing under the Laws of the State of New York, for steam surface railroad purposes, and is engaged in operating certain railroads owned or leased in the State of New York and certain railroads leased in other States, and was such railroad corporation and thus engaged during the year ending October 31, 1903, and therein as a common carrier for hire transacting the business of the transportation of persons and property, and that thereby and therein a part of its capital was employed in this State, and that continuously during the said tax year a part of its capital was thus employed outside of and not employed within the State of New York.

6 II. The defendant, Otto Kelsey is and has been since November 12, 1903, the Comptroller of the State of New York.

III. That on or before November fifteenth, 1903, this petitioner duly made a written report to the Comptroller of the State of New York, as required by Subdivision 1, of Section 189 of the Tax Law of the State of New York, being Chapter 908 of the Laws of 1896 of the State of New York, and the Acts amendatory thereof; a full and true copy of which said report is hereto annexed, marked Exhibit One, and made a part hereof.

IV. That the said report set forth and showed the condition of this petitioner at the close of its business on October 31st preceding, and stated the amount if its authorized capital stock to be $150,000,000, of which there was issued, paid up and outstanding from November 1, 1902, to January 1, 1903, $131,916,300, and from January 1, 1903, to October 31, 1903, $132,250,000, an average for the said tax year of $132,194,383, and that the average value of the said capital stock during the said tax year was $134.3125 per share, thus showing that the value of its entire average amount of issued capital stock was $177,553,580.67 and no more; that the date of the payment of each dividend declared by it during the year ending with said 31st day of October was as follows: January 15th, April 15th, July 15th, October 15th, 1903; that the aggregate rate per centum of the said dividends was five per centum; that such dividends amounted to less than six per centum on the par value of the capital stock of this petitioner; that the entire amount of the capital or assets of such corporation, this petitioner, wheresoever em-

7 ployed in and during the said tax year amounted to the sum of $369,518,732.68 and no more, of which capital or assets the said report set forth that $237,430,597.41 was the amount employed by such corporation, this petitioner, within this state during the year ending said October 31, 1903, whereas in truth and in fact $235,780,209.45 and no more, was the amount thereof actually employed within this state during the said tax year; and the said report set forth and showed that the amount of the said capital and assets employed by such corporation, this petitioner, outside of the State of New York during such year was $132,088,135.27, whereas in truth and in fact $133,738,523.23 was the amount of said capital and assets actually employed outside of this state in and during such year, and that therefore from November 1, 1902, to October 31, 1903, both

inclusive, as stated and shown by the said report, $114,085,292.58 was, whereas in truth and in fact $113,292,281.93 actually was the value of such portion of the capital stock of such corporation, this petitioner, as bears the same relation to the value of all thereof as the amount of its capital and assets employed within this state during the said tax year bears to the entire capital and assets of the corporation.

V. That subsequent to the said 15th day of November, 1903, to wit, on or about May 5, 1904, the said Comptroller audited and stated the account for the taxes to be paid by this petitioner under Section 182 of the Tax Law, and sent notice thereof to this petitioner.

VI. That the account so audited and stated was in words and figures following, to wit:

8 "COMPTROLLER'S OFFICE, ALBANY, N. Y.

THE NEW YORK CENTRAL AND HUDSON RIVER R. R. Co.

c/o E. L. ROSSITER, Treas.

GRAND CENTRAL STA., N. Y. C.

In account with the State of New York, *Dr.*

For Tax on Franchise or Business, based on Value of Capital Stock employed in New York State, per Chapter 908, Laws of 1896, and acts amendatory thereof, for the year ending October 31, 1903, as per report filed.

Appraised Value of Capital Stock.....	$123,823,381.40
Tax 1½ Mills	185,735.07"

VII. That on or about the 9th day of March, 1905, and within one year from the time that said account had been audited and stated, and notice thereof sent to this petitioner, this petitioner applied to the said Comptroller to revise and readjust the said account and to have said account resettled by striking therefrom, or by crediting to the account of this petitioner, the sum of $15,796.65; that the said application was made by written petition, duly verified on or about the 9th day of March, 1905, and entitled "In the Matter of the Application of The New York Central and Hudson River Railroad Company for a Revision and Readjustment of the Account heretofore audited and stated by the Comptroller of the State of New York for Taxes, under Section 182 of the Tax Law, for the year
9 ending October 31, 1903;" a full and true copy of which said petition and application is hereto attached, marked Exhibit Two, and by reference made a part hereof.

That thereafter, to wit, on or about the 28th day of March, 1905, the said Comptroller announced and informed said petitioner that as soon as he reasonably could he would fix a date upon which the said application could be heard, and subsequently, to wit, on

May 27, 1905, fixed the 6th day of June, 1905, as the day upon which the petitioner might be heard upon such application; that on the said 6th day of June, 1905, this petitioner duly appeared by its counsel before the Honorable Clark H. Timerman, the Deputy Comptroller; representing the said Comptroller, and gave testimony in support of said application; that upon said hearing it appeared from the revised and corrected figures that the entire amount of the capital of said corporation, this petitioner, was of the value and sum of $369,518,732.68, of which the amount of $235,780,209.45 and no more constituted its capital employed within this State during said tax year, and $133,738,523.23 was the amount of its capital employed outside of this State during said tax year; that the movable equipment of the said petitioner during the said tax year included passenger, mail and express cars of the value of $6,184,592.80, of which 84.03 per cent., or $5,196,913.33 and no more was the average portion thereof employed within the State of New York, and 15.97 per cent., or $987,679.47, was the average portion thereof which was continuously and at all times during the said tax year employed outside of and not within the State of New York, and that said petitioner's movable equipment also included freight
10 cars of the total value of $29,165,223.17, of which 36.86 per cent., or $10,750,301.26 and no more was the average portion of the said total freight car equipment which was during the said tax year employed within the State of New York, and that 63.14 per cent., or $18,414,921.91 was the average portion of petitioner's said total freight car equipment which was continuously and at all times during the said tax year employed outside of and not within the State of New York; that petitioner's said equipment and the capital invested therein, as and when in manner aforesaid used and employed outside of this State, whether by this petitioner or by other persons or corporations, were so used and employed solely and exclusively under authority of and in the exercise of corporate franchises granted to corporations of its or their creation by the respective states and territories and foreign dominions within whose territorial jurisdiction the said use and employment were had and conducted and not in the use or exercise of any franchise granted by or taxable in the State of New York, and all in and about the rendering and performance of the common carrier service of the transportation of persons and commodities between points of shipment and points of destination, respectively, within individual states, territories and dominions other than the State of New York, and and exclusively under authority of and in the exercise of corbetween points of shipment within the State of New York and points of destination in states and territories other than New York and in foreign dominions, and *vice versa*, and between points of shipment and points of destination and via routes altogether outside of the State of New York, and were thus used and employed in and about transportation local to individual states other than the State
11 of New York and transportation constituting and pertaining to interstate commerce and foreign commerce all in

such wise as did and does render it impossible for said petitioner to be informed or state the measure of such transportation employment constituting or pertaining to commerce local to any one or more individual states, or the measure thereof constituting or pertaining to interstate or foreign commerce, by means whereof to state or compute the amount of said assets or capital used or employed in either thereof, as distinguished or distinguishable from the other; and further that the average value of its capital stock during said tax year was $134.3125 per share, showing the average value of its $132,194,383 of capital stock during said tax year to have been the sum of $177,553,580.67 and no more, of which $113,292,281.93 was such portion of the value of the capital stock of such corporation, this petitioner, as the amount of its capital employed within this State bore to the entire capital of said corporation; that thereafter the said Comptroller made his determination, and sent written notice of his determination upon the said application, to the applicant, this petitioner, the said determination being as follows:

12 "STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *Sept. 11th*, 1905.

In the Matter of the Application of NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision of Taxes Assessed against it under Chapter 908, Laws of 1896, and the Acts Amendatory Thereof.

An application having been made by the above-named New York Central & Hudson River Railroad Company for a revision and resettlement of the taxes assessed and determined against it by the Comptroller of the State of New York, for the one year ending Oct. 31, 1903, and the said Comptroller having heard the proofs offered on behalf of the said New York Central & Hudson River Railroad Company, in support of said application, and after due consideration thereof, the Comptroller does hereby determine that the amount of capital stock of the New York Central & Hudson River Railroad Company employed by the New York Central & Hudson River Railroad Company within this State for the year ending October 31, 1903, including the value of its tangible assets, good will and franchises, was $122,535,265.99, and the assessment heretofore

13 made against the said New York Central & Hudson River Railroad Company, for the sum of One Hundred Eighty-five Thousand Seven Hundred Thirty-five & 7/100 dollars, should be revised to the sum of One Hundred Eighty-Three Thousand Eight Hundred Two & 90/100 dollars; which said sum of One Hundred Eighty-three Thousand Eight Hundred Two & 90/100 dollars is hereby determined as the amount which said New York Central & Hudson River Railroad Company was liable to pay under the provisions of Chapter 908, Laws of 1896, and the acts amendatory thereof for the one year ending October 31, 1903.

OTTO KELSEY, *Comptroller.*"

VIII. That in and by his said determination upon the said application and resettlement and readjustment of the said tax at and as of

the sum of $183,802.90, the said Comptroller computed the same at one and one-half mills upon each dollar of a valuation of $122,535,265.99; that the said valuation of $122,535,265.99 bears the same relation and proportion to $177,553,580.67, the average value of the entire capital stock of such corporation, this petitioner, during said tax year, as the amount of $255,016,407.03 bears to $369,518,732.68, the amount of the entire capital of such corporation, this petitioner; that the said amount of $255,016,407.03 included and embraced $19,236,197.58, being a part of and so much of $19,402,601.38, the amount and value of the average portion of the rolling stock of said corporation, this petitioner, which was proven before the said Comptroller to have been continuously employed outside of this State during the said tax year; that this petitioner then insisted, and ever since has insisted and now insists, that the said tax of $183,802.90 upon the said $122,535,265.99 valuation of its said capital stock was er-
14 roneously and unlawfully assessed or imposed and payment thereof, could not and cannot be lawfully demanded, and that the average portion of the average value of the capital stock of such corporation, this petitioner, throughout the said year which bore the same relation to the average value of the entire capital stock as the amount of capital employed within this State bore to the entire capital of the corporation, was $113,292,281.93 and no more; and that upon that sum only could such taxes be levied or imposed at the rate of one and one-half mills, amounting to $169,938.42 and no more, and that there should be such resettlement of said account as would result in striking therefrom or crediting to the account of said petitioner any and all excess of that sum; and then insisted and has ever since insisted and now insists that such portion of the value of the capital stock of the said corporation, this petitioner, as bore the same relation to the total value of its entire capital stock during said tax year as the amount and value of the average portion of its rolling stock continuously employed outside of this State during said tax year, bore to its entire capital wheresoever employed, during said year, did not nor did any part thereof constitute any part of the amount of its capital stock employed within this State, and that no tax could be lawfully computed, assessed or imposed upon the basis of such said portion of its capital stock; and that whatsoever sum of tax was computed, assessed or imposed upon the basis of such said portion of its said capital stock should be either stricken off or credited to the account of said corporation, this petitioner; that the basis of computation of the said tax as resettled and readjusted by the said Comptroller was as follows:

x: 177,553,580.67 : : 255,016,407.03 : 369,518,732.68.

15 In this statement x=$122,535,265.99, and the tax thereon at 1½ mills is $183,802.90.

That the deduction from the said $255,016,407.03 of the $19,236,197.58, being a part of and so much of $19,402,601.38, the amount and value of the average portion of the rolling stock of said corporation, this petitioner, proven before the

said Comptroller to have been continuously employed outside of this State during the said tax year, shows $235,780,209.45 and no more, as being the amount and value of the capital of said corporation, this petitioner, employed within this State during said tax year; that thus corrected the statement is as follows:

x: 177,553,580.67 : : 235,780,209.45 : 369,518,732.68.

In this statement x=$113,292,281.93, and the tax thereon at 1½ mills is $169,938.42, thus showing the said corporation, this petitioner, entitled to further resettlement of the tax by striking therefrom or crediting to this petitioner's account the further sum of $13,864.48.

IX. That taxation in and by the State of New York, for and upon and in respect of corporate creation, existence and capacity, for and during the designated term of corporate life, is by and under the law of the State of New York computed upon the basis of the amount of the authorized capital stock, and imposed, and paid, once for all, at the creation of the corporation, subject only to addition upon and in respect of subsequent increase of authorized capital stock.

That the tax here in question has relation to and is imposed in respect of the use and exercise of the corporate franchise granted by the State of New York, and as such, is at most, lawfully computable in respect of the use and exercise thereof within this State, and upon the basis of the value of that portion of the amount of petitioner's issued capital stock which has been employed within this State during the respective tax year.

That if and in so far as the enactments under color of which this tax is imposed purport to authorize taxation for or upon or in respect of the aforesaid use or exercise of franchises foreign to the State of New York, or computed upon the basis of capital thus in manner aforesaid used and employed within the territorial jurisdiction of other states, territories or foreign dominions in the use and exercise of, and under the authority of franchises granted by them or by the United States to corporations created by them, respectively, the said enactments are beyond the power and prerogative of the State of New York to prescribe and enforce and are violative of and contravene the constitution laws and treaties of the United States in that they deprive petitioner of the equal protection of the laws; also, in that they constitute the taking of property without due process of law; also, in that they constitute a regulation of, interference with and a burden upon interstate commerce and foreign commerce; also, in that they impugn the dignity and sovereignty of the United States and of sister states and of foreign dominions; also, in that they impair the obligations of the contracts arising upon and inhering in the grant to and acceptance by the corporations the lessors and licensors of said petitioner of the franchises by it as lessee and licensee used and exercised in respective states, territories and dominions other than and foreign to the State of New York; also, in that they impair the obligations of the contracts of lease of trackage right and license respectively, under and by virtue of which peti-

tioner uses and exercises in respective states and territories
17 other than the State of New York and in foreign dominions the franchises granted by them respectively to the lessors and licensors of said petitioner; also, in that they impair the obligations of the contracts, express and implied, under which petitioner is required to and does order, direct and permit or order, direct or permit its movable equipment to pass to and remain in the custody and subject to the control of other corporations and be by them controlled and used in and about the transportation of persons and property upon their roads in other states and territories and foreign dominions under authority of and in the use and exercise of franchises granted by them respectively; also, in that the said enactments, and the judgments of the officers and tribunals in and of the State of New York sustaining and administering them, in and by imposing and exacting payment to the State of New York of a franchise tax computed upon the basis of the capital of said petitioner employed within the territorial jurisdiction of other respective States, in the use and exercise of franchises granted by them, respectively, deny and refuse to give "to the public acts" of said other respective States, by and under which the said franchises are granted, and the use and exercise thereof authorized and regulated, the "full faith and credit" force and effect which the said public acts are entitled to have, and do have, in the respective States whose acts they are, by reason whereof the said petitioner alleges that the said sum of $13,864.48, the purported tax of one and one-half mills upon $9,242,984.06 in excess of $113,292,281.93, the value of the amount of $84,349,767.83 the par value of its capital stock employed within the State of New York, is erroneously and unlawfully as-
18 sessed and imposed, and that payment thereof should not have been demanded, and could not and cannot be lawfully demanded, and is wholly and altogether without foundation or authority of law.

X. That heretofore this petitioner duly deposited with the Treasurer of the State of New York the full amount of the taxes, percentage, interest and other charges audited and stated in the said account, and duly filed an undertaking with the said Comptroller in an amount and with sureties approved by a Justice of the Supreme Court of the State of New York, to the effect that if the said writ is dismissed, or the said determination is confirmed, this petitioner will pay any and all charges and costs which may accrue against it in the prosecution of the writ, including costs of all appeals, a copy of such undertaking being hereto annexed, and marked "Exhibit Three."

XI. That your petitioner is aggrieved by the said determination of the said Comptroller. That no previous application for this writ has been made to any Court or Judge.

Wherefore, your petitioner, desiring to review both upon the law and the facts said determination of the said Comptroller, upon such application made to him by your petitioner for a revision and resettlement of so much of the said account, assessment and tax hereinabove set forth as embraces and is upon and in respect of such

part of and so much of the value of its capital stock as bears the same relation to all thereof as the value of the average amount of its rolling stock equipment in manner aforesaid continuously employed outside of the State of New York during the said tax
19 year ending October 31, 1903, bears to the total value of its entire capital wheresoever employed during the said tax year, prays that a writ of certiorari may issue out of the Supreme Court of the State of New York, directed to the said Comptroller of the State of New York, commanding the said Comptroller to certify and return at the office of the Clerk of Albany County all and singular the evidence before him on such application, and all the papers and proofs upon the original statement of such account, and all the proceedings thereon and all his decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto in his possession or under his control, submitted to or considered by him, concerning the said account and the grounds for his refusal to revise and readjust the same, in and regarding the particulars hereinabove set forth, to the end that his said decisions and determinations may be reviewed and the said original and resettled account corrected and restated, and that this petitioner have such other and further relief as may be proper.

Dated New York, September 26th, 1905.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By E. V. W. ROSSITER, *Vice-President.*

IRA A. PLACE,
Attorney for Petitioner, Grand Central Station, Borough of Manhattan, New York City, N. Y.

20 STATE OF NEW YORK, *County of New York, ss:*

Edward L. Rossiter, being duly sworn, says: That he is an officer of the New York Central and Hudson River Railroad Company, the petitioner above named, to wit, the treasurer thereof; that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. L. ROSSITER.

Sworn to before me this 26th day of September, 1905.

GEO. T. BROWN,
Notary Public, Westchester County.

Certificate filed in N. Y. County.

21 EXHIBIT ONE.

Report of the New York Central and Hudson River Railroad Company for the year ending October 31, 1903, made pursuant to provisions of Sec. 182, Chapter 908, Laws of 1896, and acts amendatory thereof.

(Give post-office address of Company, Street and No.)

GRAND CENTRAL STATION, NEW YORK,
Dec. 15th, 1903.

To the Comptroller of the State of New York:

Agreeably to law, as Treasurer of the above Company, I make the following report, viz.:

1. This company began business in the State of New York in the month of November, 1869.
2. The last report made by this Company to the Comptroller of the State of New York under the provisions of the above act was made for the year ending October 31st, 1902.
3. Value of Real Estate and of interest or interests in real property in New York State, and where situated. Cannot give.
4. Organized under the laws of the State of New York.
5. Date of Organization of the Company, November 1st, 1869.
6. Total authorized Capital of Company (authorized by stockholders)..... $150,000,000.00
7. Whole number of shares of stock authorized, 1,500,000.
8. Number of shares of stock issued 1,322,500.
9. Par value of each share..... $100.00
10. Amount paid into the Treasury of the Company on each share..... $100.00

22 11. *a.* Amount of Capital paid in cash or property .....
b. Amount of Capital paid in good will $132,250,000.00
c. Amount of Capital paid in patents or copyrights.....

12. Amount of Capital upon which dividends were declared (Jany. 15th, $131,916,300). $132,250,000.00
13. Date of each dividend paid, Jan. 15th, April 15th, July 15th, & Oct. 15th.
14. Amount of each dividend paid Jan. 15th, $1,648,953.75; April 15th, $1,653,125.00; July 15th $1,653,125.00; Oct. 15th, $1,653,125.00.
15. Rate per cent. per annum of dividends, 5%.
16. The business transacted by this Company in the State of New York for the year ending October 31st, 1903, was as follows, viz: (Give nature of business and how carried on.)
Transportation.

17. And such business was carried on at the following named place or places: (Give Street and number.)
Numerous places.
18. Capital employed in New York State, $84,934,891.29.
(Preceding line need not be filled out by companies whose capital is all employed in this State.)
19. If not in New York State, where and how employed, permanently employed and invested outside of New York State.
20. What percentage of capital is employed in manufacturing in State of New York?
21. Highest price of sales of stock during the year aforesaid..156.
22. Lowest price of sales of stock during the year aforesaid...112⅝

(Signed) E. L. ROSSITER, *Treasurer.*

23 STATE OF NEW YORK, *County of New York, ss:*

On this 15th day of December, A. D. 1903, personally appeared before me, a notary public in and for the County of New York, E. L. Rossiter, treasurer of the above-named company, who, being duly sworn according to law, did depose and say, that the foregoing report is just, true and correct according as the accounts stand in the books of the company, and that it includes all dividends, whether in cash, stock, scrip or of any other character or description, declared by said company during the year ending on the thirty-first day of October, A. D. 1903.

(Signed) E. L. ROSSITER, *Treasurer.*

Sworn to and subscribed before me the day and year aforesaid.

(Signed) LOUIS BENDER,
[L. S.] *Notary Public,* No. 51.

Remarks.

Capital stock from Nov. 1st, 1902, to Jan. 1st, 1903.	$131,916,300.00
Capital Stock from Jan. 1st, 1903, to Oct. 31, 1903.	$132,250,000.00
Average capital stock for year ended Oct. 31st, 1903	$132,194,383.00

Of the total capital of this company, $19,402,601.38 in value of its equipment was employed outside of New York State. This amount is determined by taking such proportion of the value of passenger, mail and express cars as the wheelage outside of the state bears to the wheelage both in and out of the state and such proportion of the value of freight cars as the number of days cars were outside of the state bears to the total number of days (number of cars multiplied by 365 days) both in and out of the state.

24 *Recapitulation of Distribution of Assets.*

October 31, 1903.

	In New York State.	Outside N. Y.	Total.
Cost of road and equipment...	$177,963,733.51	$19,817,142.24	$197,780,875.75
Advances lessor companies ...	6,529,356.93	827,397.61	7,356,754.54
Stocks of other companies.....	16,522,269.97	109,768,477.05	126,320,747.02
Bonds of other companies. ..	4,884,495.24	.....	4,884,495.24
Cash and cash assets.....	20,188,076.79	.....	20,188,076.79
Ownership in other lines, real estate, etc.....	3,789,329.63	1,175,118.37	4,964,448.00
Bonds bought for % sinking fund.....	1,919,520.68	.....	1,919,520.68
Fuel and supplies.....	5,325,700.23	500,000.00	5,825,700.23
Items temporarily held in suspense	278,114.43	.....	278,114.43
	$237,430,597.41 64.25 %	$132,088,135.27 35.75 %	$369,518,732.68 100 %

25 EXHIBIT TWO.

In the Matter of the Application of NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision and Readjustment of the Account Heretofore Audited and Stated by the Comptroller of the State of New York for Taxes Under Section 182 of the Tax Law, for the Year Ending October 31, 1903.

To the Honorable Otto Kelsey, Comptroller of the State of New York:

The application of The New York Central and Hudson River Railroad Company respectfully shows:

1. That it is a railroad corporation duly organized and existing under the laws of the State of New York, and as such during the aforementioned tax year was engaged in operating certain railroads by it owned and leased in the State of New York, and certain railroads by it leased in other States, and thereby as a common carrier for hire transacting the business of the transportation of persons and property, and that thereby and therein a part of its capital was employed in this State, and that continuously during the said tax year a part of its capital was employed outside of and not employed within the State of New York.

26 2. That on or about the 15th day of November, in the year 1903, it duly made a written report to the Comptroller of the State of New York as required by subdivision 1 of Section 189 of the Tax Law, such report being in the form prescribed by the said Comptroller of the State of New York; and that such report showed the condition of the said company at the close of its business on October 31st preceding, and that in said report was stated the

amount of its authorized capital stock, the amount thereof issued and outstanding, the date and rate per centum of dividend declared by it in each quarter of the year ending on the said October 31, 1903, the entire capital stock of the said corporation and stated correctly, except as shown in paragraph 4 hereof, the amount thereof employed in this State during the said tax year, computed upon the basis in and by the said report set forth. That as set forth and shown in and by the said report the amount of the authorized capital stock of this company was $150,000,000, of which there was issued, paid up and outstanding from November 1, 1902, to December 31, 1902, $131,916,300, and from January 1, 1903, to October 31, 1903, $132,250,000, an average for the said tax year of $132,194,383, and that the average value of said capital stock during the said tax year was $134.3125 per share, thus showing that the value of its entire average amount of issued capital stock was $177,553,580.67, and no more.

3. That the total assets of the said petitioner wheresoever employed in and during the said tax year amounted to the sum of $369,518,732.68, and no more, of which assets amounting to the sum of $235,780,209.45, and no more, were employed within the State of New York, and of which total, assets amounting to
27 the sum of $133,738,523.23 were continuously and at all times in and during the said tax year employed outside of and not within the State of New York. That the average amount of its capital stock at par employed within this State was $84,349,767.83 of the average value of $113,292,281.93, and that of the average amount of its entire capital stock $47,844,615.17 of the average value of $64,261,298.74 was continuously and at all times in and during the said tax year employed outside of this State, and the tax lawfully computed and imposed in respect thereof was and would be the sum of $169,938.42, and no more.

4. That in and about the division of items of petitioner's said total assets pertaining to and for its said report to the State Comptroller the said petitioner by inadvertence embraced and included its entire holding of $2,597,400 of the capital stock of the Merchant's Despatch Transportation Company as of and being assets employed within the State of New York, whereas in truth and in fact only and no more than $947,012.00 thereof was employed within this State in or during the said tax year, thus involving and presenting an excess of $1,650,387.96 over and above the amount of its total assets in fact employed within the State of New York in and during the said tax year.

That computation upon the said basis erroneously made it to appear that $590,422.07 at par, and $793,010.65 at average value of petitioner's capital stock was employed in this State, which was not in fact employed therein in and during the said tax year, and thus constituted an apparent basis for computation and imposition of tax thereon in the sum of $1,189.52 which was in truth and in fact erroneous and excessive.

5. That subsequent to the said 15th day of November,
28 1903, to wit: on or about May 6, 1904, the said Comptroller audited and stated the account of taxes to be paid by said

company and sent to it notice thereof. That the said account so audited and stated was of and for a tax of $185,735.07, purporting to be a tax of one and one-half mills upon an appraised valuation of $123,823,381.45, the supposed basis thereof being that there was employed within this State in and during said tax year $257,697,191.01 of petitioner's said total assets, $92,190,512.01 of petitioner's said average capital stock at par, and $123,823,381.45 of average value of petitioner's said total capital stock.

6. That the said appraised valuation of $123,823,381.45, upon which the said tax was as aforesaid computed and imposed, included therein $10,531,099.52 of, as and being the appraised valuation of capital stock of the said company, no part of which was or consisted of such portion of the capital stock at par of the said company, as the amount of its capital employed within the State of New York in or during the year for which the said report was made, and for which the said tax was imposed, bears to the then entire capital of the said company; that the said tax so imposed upon the said $10,531,099.52 amounts to the sum of $15,796.65; that the said company has insisted and now insists that the said tax of $15,796.65 upon the sum of $10,531,099.52, no part thereof being of or within such portion of its capital stock at par as the amount of its capital employed within this State bears to its entire capital, was erroneously and unlawfully assessed and imposed and payment thereof could not and cannot be lawfully demanded, and that the said $15,796.65 of tax is wholly without authority of law.

29 7. That in truth and in fact only and no more than $84,349,767.83 of the capital stock of said company was the portion of its said entire capital stock at par which bore the same relation to the said entire capital stock as the amount of capital employed within the State of New York in or during the year for and on account of which said report was made and the said tax imposed, bore to the entire capital of said company; and that the balance of the entire amount of its capital stock, to wit, the amount of $47,844,615.17 thereof, bore the same relation to the amount of capital which was during the said year employed outside of the State of New York; by reason whereof the said company avers that the sum of $15,796.65, the purported tax of one and one-half mills upon $10,531,099.52 in excess of the $113,292,281.93, the value of the amount of $84,349,767.83, the par value of its capital stock employed within this State, is erroneously and unlawfully assessed and imposed, and that payment thereof should not have been demanded and could not and cannot be lawfully demanded, and is without foundation or authority of law.

8. The said petitioner is informed and believes and thereupon alleges that consequent upon misapprehension and erroneous supposition upon the part of the said Comptroller that petitioner had either not included any or had included an insufficient portion of its said holding of $2,597,400.00 of the capital stock of the Merchant's Despatch Transportation Company in the $237,430,597.41 of its assets reported employed in this State, he, the said Comptroller, for and in respect of the portion of said Merchant's Despatch Trans-

portation Company's capital stock deemed by him to have been employed in this State, and not so reported by this petitioner, and as constituting the basis of the tax as appraised, computed and imposed, wholly or in part in respect thereof added to the respective amounts stated in petitioner's said report the following, to wit, to the $237,430,597.41 total assets reported employed in this State, the further amount of $863,992.22; to the $114,085,292.58, total average value of capital stock reported employed in this State, the further amount of $415,147.86; and as additional tax in respect thereof $622.72. And the said petitioner alleges that if and to the extent that the said amounts were not so added by reason of and consequent upon the aforementioned misapprehension and erroneous supposition upon the part of the said Comptroller, they and each thereof were so added without evidence or fact in their support; and that the said additions are and the said $622.72 of tax is wholly and altogether and in every part unauthorized, erroneous and illegal, and payment of the said tax should not have been demanded and could not and cannot be lawfully demanded.

9. That the State Comptroller, as and constituting the basis of the tax so as aforesaid by him computed, imposed and demanded, also and further added to the respective amounts in and by petitioner's said report stated and set forth as the basis of and for computation of the said tax for said tax year, for and in respect of the average value of petitioner's movable equipment shown by its said report to have been continuously and at all times during the said tax year used and employed outside of the State of New York, to wit, to the $237,430,597.41, total assets reported employed in this State, the further amount of $19,402,601.38; to the $114,085,292.58, average value of capital stock reported employed in this State, the further amount of $9,322,941.01; and as the additional tax in respect of and computed upon said amounts the sum of $13,984.41.

Concerning the said movable equipment the said report of petitioner to the State Comptroller sets forth that:

"Of the total capital of this company $19,402,601.38 in value of its equipment was employed outside of New York State. This amount is determined by taking such proportion of the value of passenger, mail and express cars, as the wheelage outside of the State bears to the wheelage both in and out of the State, and such proportion of the value of freight cars as the number of days cars were outside of the State bears to the total number of days (number of cars multiplied by 365 days) both in and out of the State."

The items composing the said amount and value of $19,402,601.38 are as follows:

Value of average number of this company's passenger, mail, express and freight cars used by it upon roads outside of N. Y. State.....	$3,148,216.64
Value of average number of this company's passenger, mail, express and freight cars used by other companies outside of N. Y. State.....	$16,254,384.74

That petitioner's said equipment, and the capital invested therein, as and when in manner aforesaid used and employed outside of this State, whether by this petitioner or by other persons or corporations, were so used and employed solely and exclusively under authority of and in the exercise of corporate franchises granted to corporations of its or their creation by the respective states and territories and foreign dominions within whose territorial jurisdiction the said use and employment were had and conducted and not in the use or exercise of any franchise granted by or taxable in the State of New York, and all in and about the rendering and performance of the common carrier service of the transportation of persons and commodities between points of shipment and points of destination, respectively, within individual states, territories and dominions other than the State of New York, and between points of shipment within the State of New York and points of destination in states and territories other than New York and in foreign dominions, and *vice versa,* and between points of shipment and points of destination and via routes altogether outside of the State of New York, and were thus used and employed in and about transportation local to individual states other than the State of New York and transportation constituting and pertaining to interstate commerce and foreign commerce all in such wise as did and does render it impossible for said petitioner to be informed or state the measure of such transportation employment constituting or pertaining to commerce local to any one or more individual states, or the measure thereof constituting or pertaining to interstate or foreign commerce, by means whereof to state or compute the amount of said assets or capital used or employed in either thereof, as distinguished or distinguishable from the other.

32

That taxation in and by the State of New York, for and upon and in respect of corporate creation, existence and capacity, for and during the designated term of corporate life, is by and under the law of the State of New York computed upon the basis of the amount of the authorized capital stock, and imposed, and paid, once for all, at the creation of the corporation, subject only to addition upon and in respect of subsequent increase of authorized capital stock.

That the tax here in question has relation to and is imposed in respect of the use and exercise of the corporate franchise granted by the State of New York, and, as such, is, at most, lawfully computable in respect of the use and exercise thereof within this State and upon the basis of the value of that portion of the amount of petitioner's issued capital stock which has been employed within this State during the respective tax year.

33

That if and in so far as the enactments under color of which this tax is imposed purport to authorize taxation for or upon or in respect of the aforesaid use or exercise of franchises foreign to the State of New York or computed upon the basis of capital thus in manner aforesaid used and employed within the territorial jurisdiction of other states, territories or foreign dominions in the use and exercise of and under the authority of franchises granted by them or by the United States to corporations created by them, respectively, the said enact-

ments are beyond the power and prerogative of the State of New York to prescribe and enforce and are violative of and contravene the constitution laws and treaties of the United States in that they deprive petitioner of the equal protection of the laws; also, in that they constitute the taking of property without due process of law; also, in that they constitute a regulation of, interference with and a burden upon interstate commerce and foreign commerce; also, in that they impugn the dignity and sovereignty of the United States and of sister states and of foreign dominions; also, in that they impair the obligations of the contracts arising upon and inhering in the grant to and acceptance by the corporations, the lessors and licensors of said petitioner, of the franchises by it as lessee and licensee, used and exercised in respective states, territories and dominions other than and foreign to the State of New York; also, in that they impair the obligations of the contracts of lease of trackage right and license respectively, under and by
34 virtue of which petitioner uses and exercises in respective states and territories other than the State of New York and in foreign dominions the franchises granted by them respectively to the lessors and licensors of said petitioner; also, in that they impair the obligations of the contracts, express and implied, under which petitioner is required to and does order, direct and permit or order, direct or permit its movable equipment to pass to and remain in the custody and subject to the control of other corporations and be by them controlled and used in and about the transportation of persons and property upon their roads in other states and territories and foreign dominions under authority of and in the use and exercise of franchises granted by them respectively; also, in that the said enactments and the judgments of the officers and tribunals in and of the State of New York sustaining and administering them, in and by imposing and exacting payment to the State of New York of a franchise tax computed upon the basis of the capital of said petitioner employed within the territorial jurisdiction of other respective States, in the use and exercise of franchises granted by them, respectively, deny and refuse to give "to the public acts" of said other respective States, by and under which the said franchises are granted and the use and exercise thereof authorized and regulated, the "full faith and credit" force and effect which the said public acts are entitled to have and do have in the respective States whose acts they are, by reason whereof the said petitioner alleges that the said sum of $13,984.41, the purported tax of one and one-half mills upon $9,322,941.01 in excess of $113,292,281.93, the value of the amount of $84,349,767.83, the par value of its capital stock employed within the State of New York is erroneously and unlawfully assessed and imposed, and that payment thereof should not
35 have been demanded and could not and cannot be lawfully demanded and is wholly and altogether without foundation or authority of law.

Wherefore the said company makes this application and prays that the said account so audited and stated be revised and re-adjusted and that the said account be re-settled by striking therefrom or by

crediting to the account of the said company the said sum of $15,796.65 and that the said company have such other or further relief as may be proper.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By E. L. ROSSITER, *Treasurer.*

IRA A. PLACE,
Attorney for the Applicant, Grand Central Station, Borough of Manhattan, New York City, N. Y.

STATE OF NEW YORK, *County of New York, ss:*

Edward L. Rossiter, being duly sworn, says that he is an officer of the New York Central and Hudson River Railroad Company, the applicant above named, to wit, the treasurer thereof; that the foregoing application is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters *be* believes it to be true.

E. L. ROSSITER.

Sworn to before me this 9th day of March, 1905.

ALBERT B. QUENCER,
Notary Public, New York County.

36 EXHIBIT THREE.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Whereas, the above named, The New York Central and Hudson River Railroad Company, heretofore, on or about the 9th day of March, 1905, applied to the Comptroller of the State of New York to revise and readjust the account heretofore audited and stated by the said Comptroller, imposing a tax upon the said The New York Central and Hudson River Railroad Company for the year ending October 31st, 1903, under Section 182 of the Tax Law, and to have said account resettled by striking therefrom, or by crediting to the account of said railroad company the sum of fifteen thousand seven hundred ninety-six and 65/100 dollars ($15,796.65), and the said Comptroller having thereafter, a hearing having been had upon the said application, made his determination, allowing a credit to
37 the said company on the books of the department of the sum of one thousand nine hundred thirty-two and 17/100 dollars; and

Whereas, the said The New York Central and Hudson River Railroad Company is dissatisfied and aggrieved by the said determination, and intends to review the said determination by writ of certiorari, and desires to file an undertaking with the writ of certiorari, and desires to file an undertaking with the said Comptroller as required by Section 197 of the Tax Law;

Now, therefore, the National Surety Company, a corporation duly authorized by the laws of the State of New York to execute surety bonds, having an office and principal place of business at No. 346 Broadway, Borough of Manhattan, City of New York, does hereby undertake that if the said writ of certiorari, which may be granted upon the application of the said The New York Central and Hudson River Railroad Company to review the said determination, be dismissed, or the determination of the Comptroller be confirmed, the said The New York Central and Hudson River Railroad Company will pay all costs and charges which may accrue against it in the prosecution of the said writ, including the cost of all appeals, not exceeding the sum of five hundred ($500.00) dollars.

Dated New York, September 18th, 1905.

NATIONAL SURETY COMPANY,
By JOEL RATHBONE, *Res. Vice President.*

Attest: RICHARD J. MORIARTY,
[L. S.] *Res. Assist. Secretary.*

38 STATE OF NEW YORK, *County of New York, ss:*

On this 18th day of September, 1905, before me personally appeared Joel Rathbone, Res. Vice-President of the National Surety Company, with whom I am personally acquainted, who being by me duly sworn, said that he resides in the County of New York; that he is the Res. Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said Company, and that he signed said instrument as Res. Vice-President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720 of New York Session Laws of 1893. And the said Joel Rathbone further said that he is acquainted with Richard J. Moriarty, and knows him to be the Res. Ass't Secretary of said Company; that the signature of the said Richard J. Moriarty subscribed to the said instrument is in the genuine handwriting of the said Richard J. Moriarty and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Joel Rathbone, Res. Vice-President.

BELLE F. JAIS,
Notary Public for the County of N. Y.

Certificate filed in Kings, Westchester, Richmond and Queens Counties.

39 *Copy of By-Law.*

Be it remembered, that at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following by-law was adopted:

"ARTICLE XIII. SEC. 1.—*Signatures Required.* All bonds, recog-"nizances, contracts of indemnity and other writings obligatory in "the nature thereof, shall be signed by the President, the Vice-"President, the Second Vice-President, a Resident Vice-President, or "an attorney in fact, and, except when signed by an attorney in "fact, shall have the seal of the Company affixed thereto, duly at-"tested by the Secretary, an Assistant Secretary or a Resident As-"sistant Secretary. The Vice-President, Second Vice-President and "Resident Vice-President shall each have authority to sign such in-"struments whether the President be absent or incapacitated or not; "and the Assistant Secretaries and Resident Assistant Secretaries "shall each have authority to seal and attest such instruments, "whether the Secretary be absent or incapacitated or not. All such "instruments executed as herein provided shall be as binding upon "the Company as if the same were signed by the President, duly "sealed and attested by the Secretary."

STATE OF NEW YORK, *County of New York, ss:*

I, Richard J. Moriarty, Res. Ass't Secretary of the National Surety Company, have compared the foregoing copy of by-law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and seal of the Company this 18th day of September, 1905.

RICHARD J. MORIARTY,
[L. S.] *Res. Ass't Secretary.*

40 At a Special Term of the Supreme Court, held in and for the County of Albany, at the County Court House in the City of Albany, N. Y., on the 29th day of September, 1905.

Present: Hon. G. D. B. Hasbrouck, Justice.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Order for Issuance of Writ of Certiorari.

Tax of 1903.

On reading and filing the petition verified and dated the 26th day of September, 1905, of The New York Central and Hudson

River Railroad Company, and upon the undertaking heretofore filed by the said railroad company, pursuant to section 197 of the Tax Law, and upon the notice of this application duly served on the Comptroller of the State of New York, and after hearing Harris & Rudd, Esqrs., of counsel for the petitioner, and on motion of Ira A. Place, Esq., attorney for the petitioner, the Attorney General appearing and consenting to the making of the application at this time instead of on September 30th, 1905, it is

Ordered that a writ of certiorari do issue from and out of this Court pursuant to the prayer of the petitioner, directed to
41 Otto Kelsey, as Comptroller of the State of New York, to review the decision and determination of the said Comptroller mentioned and described in the petition, and the question involving the merits therein mentioned, both upon the law and the facts, which writ shall be returnable within twenty days after service thereof upon the said Comptroller, at the office of the Clerk of Albany County.

Enter.

JOHN FRANEY, *Clerk.*

42 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Writ of Certiorari.

Tax of 1903.

Whereas we have been informed by the verified petition of The New York Central and Hudson River Railroad Company, dated and verified the 26th day of September, 1905, that certain proceedings have been had before the Comptroller of the State of New York in a certain matter entitled "In the Matter of the Application of The New York Central and Hudson River Railroad Company for a revision and Readjustment of the account heretofore audited and stated by the Comptroller of the State of New York for taxes under section 182 of the Tax Law, for the year ending October 31st, 1902," upon the application of the said Railroad Company to revise and readjust an account theretofore audited and stated by the said Comptroller of the State of New York for taxes to be paid by the said The New York Central and Hudson River Railroad Company under section 182 of the Tax Law, the petition upon which the said application was made being verified March 9, 1905, and a hearing upon such application having been had on the 6th day of June, 1905, and the said Comptroller having there-
43 after made his determination and sent written notice of his determination upon such application to the applicant, the

petitioner herein, allowing in part and denying in part the application for revision or readjustment of the said account, and the said The New York Central and Hudson River Railroad Company having now made application to this Court for a writ of certiorari to review, in so far as the said application was denied and refused, the said decision and determination of the said Comptroller.

And we being willing for certain purposes to be certified of such proceedings, if any such were had, do hereby command and strictly enjoin Otto Kelsey, as Comptroller of the State of New York, that he certify and return all and singular the evidence before him on such application, and all the papers and proofs upon the original statement of such account and all proceedings thereon, and all his decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto in his possession or under his control, submitted to or considered by him, concerning the said account and the grounds of his refusal to revise and readjust the same, as prayed for in the petition, within twenty days after the service upon him of this writ, at the office of the Clerk of Albany County, under his proper hand, pursuant to the provisions of the Tax Law and the provisions of Title II. of Chapter 16 of the Code of Civil Procedure, so that our Supreme Court may further cause to be done thereon what of right and according to law ought to be done, and let the defendant have then and there this writ.

Witness the Hon. G. D. B. Hasbrouck, Justice of our Hon-
44 orable Court, at the Court House in the City of Albany, N. Y., this 29th day of September, 1905.

JOHN FRANEY, *Clerk.*

IRA A. PLACE,
Attorney for the Relator, Grand Central Station, Borough of Manhattan, New York City, N. Y.

The above writ is hereby allowed this 29th day of September, 1905.

G. D. B. HASBROUCK,
Justice Supreme Court.

45 *Return.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

1903.

Otto Kelsey, as Comptroller of the State of New York, the respondent herein, makes return to the writ of certiorari herein as follows:

I. He admits the truth of the allegations contained in paragraphs 2, 3, 5, 6 and 10 of the petition herein.

II. He admits that the petitioner is a domestic railroad corporation, organized and existing under the laws of this State for a steam surface railroad purposes, engaged in operating certain railroads, and was so engaged during the year ending October 31, 1903, as a common carrier for hire transacting the business of the transportation of persons and property. That the report mentioned in
46 paragraph 3 of the said petition stated the amount of the authorized capital stock of petitioner to be $150,000,000, of which there was issued, paid up and outstanding from November 1, 1902, to January 1, 1903, $131,916,300, and from January 1, 1903, to October 31, 1903, $132,250,000, an average of $132,154,383. That the dates of payments of dividends and the rate thereof were as mentioned in paragraph 4 of said petition. That the said report stated the entire amount of the capital or assets of the petitioner to be $369,518,732.68.

III. He admits that the application for the revision and readjustment of the account for taxes mentioned in paragraph 7, was made and granted and that the rehearing mentioned therein was held, at which time the petitioner appeared by its counsel and submitted evidence. That the Comptroller thereupon resettled and readjusted said account for taxes at the sum of $183,802.90.

IV. He denies the truth of the allegations of said petition, except as the same are expressly admitted herein.

V. He returns herewith the evidence and exhibits used in the proceedings before him, except those, copies of which are attached to the petition herein.

VI. He further alleges that the tax mentioned in said petition, was regularly, duly and legally imposed, settled and collected, pursuant to the provisions of the Tax Law of this State, and that the relator is not justly aggrieved thereby.

47 In witness whereof, the Comptroller has hereunto set his hand and seal this 20th day of October, 1905.

OTTO KELSEY, *Comptroller,*

[L. S.] By WILLIS E. MERRIMAN,
2nd Dep. Comptroller.

(Endorsed.)

SIR: Take notice that the within is a copy of a return duly filed and entered in the office of the Clerk of Albany County, on the 20th day of October, 1905.

Yours, etc.,

JULIUS M. MAYER,
Attorney-General, Attorney for Resp'd't.

To Ira A. Place, Attorney for Relator.

48 State of New York, Comptroller's Office.

In the Matter of the Application of the NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision and Readjustment of Taxes Assessed Under the Provisions of Chapter 908, Laws of 1896, and the Acts Amendatory Thereof for the Years 1902, 1903 and 1904.

Rehearing held at the office of the State Comptroller, June 6th, 1905, before Honorable Clark H. Timerman, Deputy State Comptroller.

Appearances.

J. H. Foulds, Jr., for the Company.
F. E. Williamson, for the Company.
Ira A. Place, represented by Thomas Emery, as counsel.

By COUNSEL: Now we have the three capital stock matters.

Mr. MERRILL: 1902, 1903 and 1904.

By COUNSEL: Yes, it will be a useless repetition to take the evidence separately for each, unless for reasons you desire to have it so.

Mr. MERRILL: Just make a statement of your contention, Mr. Emery.

49 By COUNSEL: Well, briefly, it is set out in our application, of course. Taking up the first, the year 1902.

Mr. MERRILL: What is this amount of $2,311,686.00, for instance, in this 1902 contention, what is that, on what ground do you claim that that should be excluded?

By COUNSEL: That is the capital stock of the M. D. T. Co.

Mr. MERRILL: Yes, that is the only new question you have involved here, that capital stock.

By COUNSEL: This is the situation, to state it as briefly as I can. In a previous year we had made the question whether we should be taxed on our holdings of Merchant's Despatch Transportation Company stock. We had been reporting it, including for taxation such percentage as we understood, such percentage of our holdings of that stock as constituted proportion of M. D. T. stock capital employed in this State. The Appellate Division, when the matter went there for review, held that we were liable to be taxed for all of it, and pending that judgment and before its review by the Court of Appeals one of our reports was made following judgment of the Appellate Division and including it all. Subsequently that was reversed and our contention sustained by Court of Appeals, but our Tax Department didn't understand that, and it resulted in the following year they included it all. On the other hand, this office supposed we hadn't included any of it. At any rate, that is the understanding I have of it, which I think Mr. Merrill will confirm, that we had included it all, and they thought we hadn't included any, so they added to it what they claim should be in. That
50 was one item, and that is the essential thing in which the figures are changed in the amended application from the original one, because in the meantime we learned where we were at, and

that is we had made one mistake and the office here made another by reason of misapprehension of what we had done.

By Deputy Comptroller TIMERMAN:

Q. You wish to have this tried out along lines of Court of Appeals decision?

By COUNSEL: I do not think there is any question between us about that now. As I understand it it is simply to get proper figures before this department,

What I have said thus far would not give you complete idea of change of our application. The amended application changes further this feature. In the other cases we put in the evidence calculated to lay the foundation, as we thought, for a review by the United States Supreme Court, if desirable. Upon the hearing in the Court of Appeals our remittitur was made to show that the constitutional questions were raised, and in order to put beyond peradventure any question on that subject we amended this application conformable to the same applications made for other years, so as to set that question out clearly. The only things I think necessary for us to go into in this examination are the showing of the facts of what we undertake to show:

First, what the correct report would have been if we hadn't labored under this misapprehension that I speak of. By that disclose just what error there was in our report as made. Then show what the additions were that were made to that report in this department;

51 that is, first, as I have said, the M. D. T. stock which we had erroneously included entire, and the department supposed we hadn't included at all; and second, that outside claim. That is really our more important question in the case. That is to say, practically 60 per cent. of our rolling stock, that is in our freight cars and a considerable percentage of our passenger cars, but much smaller, are constantly in the service upon foreign lines and outside of the State. It is not any particular cars that are so used. They are changing every day and every hour of the day, so with something upwards of forty millions worth of rolling stock we have the use ourselves of practically two-fifths of it. That is to say, the other three-fifth-, substantially that, is on foreign roads, and in use by them, and largely in use that we cannot control, if we wanted to, because in the course of business cars are transferred from one company to another without consultation at all with the owning company. In addition to that the company operates what in general terms is known as New York Central System. That includes the Boston and Albany, essentially in Massachusetts; the West Shore and Jersey Junction in New Jersey, and quite a number of roads in Pennsylvania. Our cars are used on all of these lines together. We contend then that instead of all of this entire rolling stock being regarded as assets employed in this State, and hence to be made the basis of computation of the amount of our capital stock employed in the State, that these portions, to wit, the portion which we use on our operated lines in the New York Central System, but outside of New York State, should be deducted, and that the portion used upon foreign lines and outside of New York State should be deducted.

52 J. H. FOULDS, JR., being duly sworn, testified as follows:

By COUNSEL:

Q. Mr. Foulds, state where you reside, please?
A. Where I reside?
Q. Yes?
A. White Plains, New York.
Q. By whom and how are you employed?
A. By the New York Central, in the Auditor's office, assistant to Mr. Meeder, Chief Clerk.
Q. How long have you been engaged there in substantially the same line of service?
A. Since February, 1902.
Q. And what has been the fact in the meantime as to your making or assisting in the making of reports made by the company, or on its behalf, to the State Comptroller for taxation with reference to the capital stock of the company?
A. Well, they have been prepared largely by me personally or under my supervision.
Q. You gave attention to them for the purpose of knowing their accuracy, did you?
A. Yes, sir.
Q. And what is the fact as to whether you have, at my instance, prepared a statement with reference to that report, and the capital stock subject to taxation, a copy of which I now hand you?
A. I prepared this statement in response to your request.
Q. What have you to say as to figures set out in it under the separate headings being or not being corrrect?
A. I believe them to be correct.
Q. The first item upon this paper, to which I have called your attention, Mr. Foulds, total assets, what does that mean?
A. That represents the total assets of the New York Central and Hudson River Railroad, as shown by the balance sheet.
Q. For that year?
A. Of October 31st, 1902.

53 Q. And the item, "average capital stock at par," what does that mean?

A. That represents the result obtained by taking the highest amount of stock outstanding during the year and the lowest amount and averaging. The highest amount outstanding at par and the lowest amount outstanding during the year and averaging according to the number of months in which each was outstanding.
Q. And the item, "average cash value $200,156,525.69," what does that mean?
A. That is the average capital outstanding at par, multiplied by average price of stock during this year.
Q. And the row of figures across the page under the heading "Revised Statement," and with reference to their respective headings under which the figures appear, upon what are the computations based by which the results stated are shown?
A. Those figures under heading of "Revised Statement," those

figures are obtained by taking our report figures and deducting from them the eighty-nine per cent. of M. D. T. stock, which we reported under a misapprehension in total.

Q. And so, then, the figures reading across the page under the words "as per report," they are the figures as the reports show?

A. Those are the figures as per report sent to the Comptroller.

Q. And upon the basis that you computed it then the revised statement amounted merely to the deduction of that eighty-nine per cent. of M. D. T. stock from the amount in report?

A. Yes, sir.

Q. Now, in making these computations as shown under the heading "Revised Statement," you computed as not employed in the state the items in the two lines under the heading "Add Outside Equipment," did you?

A. Yes, sir.

Q. Now state, if you please, with reference to these items under the heading "Outside Equipment," first, is statement "4,780,862.98" under the heading "Assets Employed in New York State,"
54 that is, you mean employed in New York State as the basis of computation of the tax that this office imposed?

A. Yes, sir.

Q. And that $4,780,862.98 is made up how—what is it composed of?

A. It is composed of the value of the equipment arrived at on a basis of car mileage on New York Central system outside the State of New York.

Q. And the item under the same head; that is, under the same general heading but under the subheading "on foreign roads $11,865,528.08," what does that mean and how was it arrived at?

A. That amount is computed upon the basis of car mileage, as representing the use of New York Central cars on foreign lines outside the State of New York.

Q. And the item in the left-hand column, item last but one, $3,593,804.09, was the difference, was it, between the items of assets accounted for in the previous items and the total, which was apparently made the basis of taxation as imposed by this office, as you understand it?

Objected to by Mr. Merrill on the ground that it is a conclusion without any substantiation whatever.

By COUNSEL: I am simply asking him to explain what that one item is making up that total.

By Deputy Comptroller TIMERMAN: I think there should be some proof on which apparent sum is obtained by which you claim we make this taxation.

Objection withdrawn.

A. It was.

By COUNSEL: I offer statement in evidence.

55 By Deputy Comptroller TIMERMAN: Do you offer this statement as proof of the facts contained therein?

By COUNSEL: I offer it with the witness's testimony as part of his testimony.

By Deputy Comptroller TIMERMAN: Merely as explaining his contention?

By COUNSEL: Yes.

By Deputy Comptroller TIMERMAN: And not as proof of the facts contained therein?

By COUNSEL: Except as his testimony as he had given.

By Deputy Comptroller TIMERMAN: That stands for itself.

By COUNSEL: I offer it as part of testimony of the witness.

By Deputy Comptroller TIMERMAN: If it is offered as proofs of facts contained therein, I do not think we can receive it.

By COUNSEL: Only in sense that his testimony is offered as proof.

By Deputy Comptroller TIMERMAN: That stands for itself; now you offer paper in addition to his testimony.

By COUNSEL: Not in addition to it; I offer it as part of his evidence.

By Deputy Comptroller TIMERMAN: For all purposes, without any limitations?

By COUNSEL: As part of his evidence.

By Deputy Comptroller TIMERMAN: Then I do not think I can receive it. I will receive it if it isn't offered as proof of facts, but merely as computation, showing position which you take in these matters.

By COUNSEL: I will proceed with some further questions.

Q. In the course of its business, Mr. Foulds, does the com-
56 pany have reported to it the whereabouts and employment of its equipment from time to time?

A. I don't just understand the question.

Q. Question read by stenographer?

A. It does.

Q. And is memoranda preserved of such report?

A. Yes, sir.

Q. And in making up, or doing what you did with reference to making of the report of the company to this office for the purposes of taxation, did you have access to that data?

A. Not directly.

Q. Well, explain how it was, and from what source you got information?

A. We received the basis upon which the use of cars within and without the State is computed from the office of Superintendent of Freight Transportation, who has charge of such records.

Q. And from the reports which that office made to you, then, you made the computation?

A. Yes, sir.

Q. And what have you to say as to whether the sources of information from which and upon which you acted in the making up of the statement to which I have called your attention, were or were not the same as those which you availed yourself of for purpose of making the report to this department?

A. I believe them to be the same.

Q. What was the total value of the company's equipment for the year 1902?

A. $46,619,097.89.

Q. How much of that was what is known as floating equipment?

A. $1,937,224.27.

Q. And that left as rolling equipment how much?

A. $44,681,873.62.

Q. And what do you say was the amount of this equipment used on foreign roads during that year?

A. The total amount?

Q. In use on foreign roads outside New York State?

A. $11,865,528.08.

Q. Then, how much of this equipment was used on foreign
57 roads in New York State?

A. $1,409,970.40.

Mr. MERRILL:

Q. You mean other than New York Central system in New York State?

By COUNSEL:

Q. The meaning in the last question was roads foreign to New York Central system, but situate within the State of New York; is that the way you understood in answering it?

A. That is the way I understand the use of foreign roads.

Q. And that left, then, the total value of rolling equipment in use in New York Central system, how much?

A. $31,406,375.14.

Q. And of that amount which you have last named, how much was used on the New York Central system, but outside of New York State?

A. $4,780,862.98.

Q. What, then, was the amount of equipment in use in New York State on the New York Central system for that year?

A. $26,625,512.16.

Q. In the making of, or supervising the making of, reports to this department for taxation for the year ending October 31st, 1902, then what items of assets and amounts of each of this equipment did you count as constituting assets which should be considered in computing the amount of capital stock subject to taxation for that year?

A. The value of equipment in use in New York State on New York Central system, $26,625,512.16; on foreign roads, $1,409,970.40; floating equipment, $1,937,224.27.

Q. And that made the amount of these assets in the way of equipment to enter into basis of taxation, a total of what?

A. $29,972,706.83.

Q. In the business and operations of the New York Central and Hudson River Railroad Company, is there or is there not what is recognized as the New York Central System?

A. There is.

58 Q. And what does that include?

A. Includes the New York Central and Hudson River Railroad.

Q. In a general way?

A. And its leased and operated lines.

Q. That is, all lines operated directly by New York Central and Hudson River Railroad Company?

A. Yes, sir.

Q. And those lines are situated in what State?

A. New York, Massachusetts, Pennsylvania and New Jersey.

Q. What is the fact as to its operated roads outside of New York State as to whether they are all or approximately all operated under leases?

A. I believe they are all operated under lease.

Q. In some instances trackage rights where this company and another or other companies operate over same rails?

A. In addition to leased lines we hold some trackage rights over other lines.

Q. What have you to say as to whether the memorandum here submitted to you sets forth correctly the leases under which this company operate the lines therein mentioned during the tax year in question, and as to the respective companies having been incorporated by those respective States as of the dates set forth?

A. To the best of my knowledge and belief the record is correct.

Q. And what is the fact as to these respective leases requiring the lessee company to pay all taxes upon the leased property as a part of its rental?

A. To the best of my knowledge and belief that is correct. Memorandum of lines operated by N. Y. C. as a part of its system in the states named:

Massachusetts:

Boston & Albany, incorporated January 10, 1871, by consolidation of numerous roads.

Leased November 15, 1899.

59 New Jersey:

West Shore Railroad, incorporated (reorganization) December 5, 1885.

Leased December 5, 1885.

Hoboken & Hudson River Turnpike Co. (Bull's Ferry to Hoboken), incorporated March 16, 1857; merged in New York and Bull's Ferry Railroad Company (Bull's Ferry to Jersey City), incorporated March 14, 1861; name changed to New York and Ft. Lee Railroad Company March 9, 1862.

Leased June, 30, 1886.

Hoboken Land & Improvement Company (Weehawken southerly to other railroads), incorporated March 8, 1860.

Leased March 1, 1886.

New Jersey Junction Railroad Company (Township of Union to Jersey City), incorporated February 27, 1886.

Leased July 1, 1886.

New Jersey Shore Line Railroad Company (Township of Union, Hudson County, to Town of Harrington, Bergen County), incorporated March 2, 1886.

Stock owned by N. Y. C.

Pennsylvania:

Dunkirk, Allegheny Valley and Pittsburgh, incorporated (consolidation), December 31, 1872.

Leased January 3, 1873.

Jersey Shore, Pine Creek and Buffalo (Jersey Shore to Port Allegheny, McKean County), incorporated February 17, 1870; name changed to Pine Creek Railway Company February 13, 1884.

Leased May 1, 1899.

Beech Creek Extension Railroad Company, incorporated (consolidation) March 30, 1891.

Leased May 22, 1901.

60 Clearfield Southern Railroad Company, incorporated July 6, 1898; certificate amended October 26, 1903.

Leased October 1, 1903.

Syracuse, Geneva & Corning, incorporated (consolidation) November 2, 1885.

Leased May 1, 1899.

Curwensville & Bower, incorporated March 31, 1903.

Leased March 31, 1903.

Pittsburgh & Eastern, incorporated (consolidation) November 16, 1896.

Agreement for operation, December 27, 1899.

Leased February 24, 1904.

Corning, Cowanesque & Antrim, incorporated (consolidation) January 2, 1873; name changed to Fall Brook Railway Company July 1, 1892.

Leased May 1, 1899.

Beech Creek Railroad Company, incorporated June 30, 1886 (reorganization).

Leased October 1, 1890. Cambria County Railroad Company, incorporated August 31, 1896; consolidated with Beech Creek Railroad Company under name of Beech Creek Railroad Company, May 11th, 1898.

Statement headed "New York Central Capital Stock Tax 1902" marked "Exhibit A for identification."

By COUNSEL:

Q. Mr. Foulds, the statement marked "Exhibit A for identification," do you identify that as the one to which your attention was directed and concerning which you gave various respective answers in your previous testimony?

A. I do.

By COUNSEL: I now offer this statement in evidence as a part of the testimony of the witness.

61 Mr. MERRILL: I object to so much of it as is a conclusion.

Deputy Comptroller TIMERMAN: I think that part I will have to sustain.

Exception taken.

By Mr. MERRILL:

Q. Mr. Foulds, what balance sheet did you take this total statement of assets from?

A. Balance sheet of New York Central and Hudson River Railroad Company in the auditor's office.

Q. Does this statement of assets include the original cost of these assets?

A. I believe they do in all cases.

Q. Without deduction?

A. Without deduction.

Q. In arriving at the average amount of the capital stock issued and outstanding during the year ending October 31st, 1902, you did not take, as I understand you, the amount outstanding on November 1st, 1901, and then by determining the number of days that the several shares of stock issued in addition thereof were outstanding, obtained the average in that way?

A. Well, we obtained it by taking the number of months that a certain amount was outstanding and the number of months that another amount was outstanding, adding the two together and dividing it by twelve.

Q. Will the books of the company show the dates of issue of these several amounts of capital stock?

A. They will.

Mr. MERRILL: The Comptroller asks you to furnish a statement of the several dates when capital stock was issued, and the amounts issued on the several dates of the capital stock of the New York Central and Hudson River Railroad during the year ending October 31st, 1902.

62 Q. In the testimony which you have given in relation to equipment outside of the State of New York, do you know, or has there been any computation made which would show whether or not any of the equipment of the New York Central and Hudson River Railroad Company was used continuously and exclusively without the State of New York?

A. So far as I am aware there is not.

Q. None of it?

A. As far as I am aware there has been no such computation in connection with this report.

Q. Do you know whether there is any such equipment which is used continuously and exclusively without the State?

A. I do not.

Q. Do the figures which were furnished you show any such thing?

A. They do not.

Mr. MERRILL: The Comptroller will ask you to furnish a statement of all equipment of the New York Central and Hudson River Railroad Company used continuously and exclusively without the State of New York.

By COUNSEL: It is admitted that there is no substantial amount of the equipment of the New York Central and Hudson River Rail-

road Company that was used permanently, continuously or exclusively without the State during the entire tax year in question.

By Mr. MERRILL:

Q. In the computation which was made Mr. Foulds, based on mileage without and within the State that might be so made as to include a great many hundred miles of car mileage for one car and very little car mileage for another, might it not without regards of property value of the car itself?

A. I believe that it might.

Q. For instance, if a carload of goods of any description should be shipped in one car from New York to San Francisco, in
63 such a determination as that the wheelage of that one car might be very large, larger than the wheelage of a half dozen or more cars employed constantly within the State of New York, might it not?

A. It might.

Q. What was the total value of the equipment of the New York Central and Hudson River Railroad Company during the year ending October 31st, 1902, on the average?

A. In round figures?

Q. You know, exactly, don't you?

A. $46,619,097.89.

Q. That was the cost of that equipment, was it?

A. That is the amount charged on the ledgers.

Q. As the cost?

A. As the cost of that equipment.

Q. Now, what was the amount of the stock of the Merchant's Despatch Transportation Company which you claim was employed in the State of New York, and the property of the New York Central and Hudson River Railroad Company?

A. Eleven per cent. That eleven per cent. means eleven per cent. of the amount owned by the New York Central.

Q. Mr. Foulds, you have testified that upon the figures supplied you by the Auditor's Department of the New York Central and Hudson River Railroad Company, the percentage of the stock of the Merchant's Despatch Transportation Company, owned by the New York Central and Hudson River Railroad Company and employed in New York State, was eleven per cent.?

A. Yes, sir.

Q. Have you any knowledge as to how that basis was arrived at?

A. I have not.

Mr. MERRILL: Well, the Comptroller desires to submit a copy of the determination made by this department with relation to the portion of capital stock of the Merchant's Despatch Transportation Company employed in conducting its business in this State,
64 after a hearing held before Deputy Comptroller Timerman on May 4th, 1904, for the year ending October 31st, 1903, and the amount of capital stock outstanding for that year being the same as it was heretofore.

By COUNSEL: I object to it on the ground that it is immaterial and irrelevant.

Mr. MERRILL: It is material, because it shows more than three times the amount the New York Central claims was employed here.

Deputy Comptroller TIMERMAN: As I understand it, this inquiry here doesn't cover any period of any tax that was determined in this proceeding of May 4th.

Mr. MERRILL: No, but the same amount of capital stock was outstanding in the Merchant's Despatch Transportation Company in both years, so that the percentage employed here would be the same for both periods.

Objection sustained.

By Mr. MERRILL:

Q. Mr. Foulds, is there anything in the possession of the New York Central and Hudson River Railroad Company, either upon their books or otherwise, that would show conclusively the amount of the capital stock of the Merchant's Despatch Transportation Company used and employed in the State of New York during the year ending October 31st, 1902?

A. I don't believe there is.

Mr. MERRILL: The Comptroller asks that the New York Central and Hudson River Railroad Company produce at this office a witness or witnesses who are competent to testify as to the portion of the capital stock of the Merchant's Despatch Transportation Company employed in doing business in this State during the year ending
65 October 31st, 1902. Will the company produce it?

By COUNSEL: I don't know; if we don't we cannot get the benefit of it.

By Mr. MERRILL:

Q. Have you any knowledge as to how this eleven per cent. basis was arrived at?

A. I have not.

Q. Mr. Foulds, is there any legal entity by the name of the New York Central System?

A. I do not think there is.

Q. Don't you know that there isn't?

A. Yes, sir.

Q. You simply use that term relatively to cover lines leased by the New York Central and Hudson River Railroad Company, over which it operates its cars?

A. Yes, sir.

Q. Over which it operates owned and leased lines?

A. Yes, sir.

Q. Is it or is it not a fact that the New York Central Company operates the cars of other companies over its own and leased lines?

Objected to by Mr. Emery, on the ground that it is irrelevant and immaterial. The tax here is on our capital; it is the employment of our capital in this State, and an unjust tax on our capital is not

to be excused by showing that the law might make us liable for taxation on some other body's capital.

Deputy Comptroller TIMERMAN: While that might be true, Mr. Emery, I think I will receive the answer to this question, merely as part of the cross-examination.

Exception taken.

A. It does receive cars from other companies.

Q. Is that true with relation to their equipment, too?

Same objection, same ruling. Exception taken.

66 A. I believe not.

Q. Doesn't apply to locomotives and other equipment besides cars?

A. I should say not.

Q. When a car starts from the City of New York and travels westward over the lines of the New York Central Railroad Company and other railroad companies to California, and is then returned either empty or loaded with freight, does that car as property become the subject of taxation elsewhere than in the State of New York?

Objected to by Mr. Emery as incompetent, irrelevant and immaterial.

Mr. MERRILL: I show, Mr. Comptroller, that this property has its *situs* in the State of New York and nowhere else.

Objection overruled. Exception taken.

A. I do not know.

Q. Where does the ownership of the railroad of the New York Central and Hudson River Railroad Company end at its eastern (western) terminal?

A. City of Buffalo.

Q. Does the New York Central and Hudson River Railroad Company, as a railroad company, operate west of the City of Buffalo?

A. It does not—some little points beyond, between Black Rock, or something of that kind.

Q. None beyond the State of New York?

A. No, that is what I understood you to say.

Q. Then Mr. Foulds, when you have figured the car wheelage, mileage west of Buffalo, you have been figuring the business conducted by some other railroad company than the New York Central Railroad Company, have you not?

A. We have.

Q. What is the par value of the ownership of the New York Central and Hudson River Railroad Company in the stock of the

67 Merchant's Despatch Transportation Company?

A. I couldn't say from memory—$2,597,400.00.

Q. Does that item of ownership, or a portion of it, appear in the $109,669,172.12 reported to the Comptroller as stocks of other companies outside the State of New York?

A. Does not.

Q. Where does it appear in this report?

A. Appears in the column headed "in the State of New York."

Q. The entire amount appears in there, does it?
A. It does.
Q. What is this "outside State of New York" amount made up of?
A. In the ownership of companies outside the State of New York.
Q. What companies?
A. Lake Shore and Michigan Southern, Michigan Central and other companies.
Q. Now, the cost of the road and equipment, excluding only that equipment which you claim was employed outside the State of New York was $174,618,395.45, was it not?
A. It was.
Q. In addition to that the company has claimed that this equipment, which it is admitted was practically none of it exclusively and continuously employed outside the State of New York, was $16,646,391.06, was it not?
A. It was.
Q. Now, under the head of "In State of New York" lessor companies, what does the term "lessor companies" mean?
A. It means money advanced or expended upon the roads of lessor companies of the New York Central, leased lines.
Q. And did the New York Central and Hudson River Railroad Company advance these moneys upon notes?
A. Not to my knowledge.
Q. How were they advanced generally?
A. Amounts spent upon the property by the New York Central.
Q. And had the New York Central no means of the re-
68 covery of the amount so expended?
A. Not in all cases.
Q. Well, how about a vast majority of the cases?
A. I should say to some extent they would have means.
Q. What did the New York Central and Hudson River Railroad Company have to show for such advances?
A. Nothing but the charge against the line, against the road.
Q. Charge against the road upon its books of account?
A. Yes.
Q. Well, then these two amounts, Mr. Foulds, $6,044,757.71 and $2,283,128.03 represent investments made upon leased line by the New York Central and Hudson River Railroad Company within and without the state respectively?
A. Yes, sir.
Q. And in the report rendered to Comptroller for the year ending October 31st, 1902, in the item of $16,499,270.65, stocks of other companies in the State of New York, you included the entire ownership of the New York Central and Hudson River Railroad Company in the stock of the Merchant's Despatch Transportation Company?
A. We did.
Q. In the statement of $109,669,172.12, stocks of other companies outside the State of New York, did you include in that the percentage of the stocks of those companies employed in doing business in the State of New York; for instance, as in the case of the Lake Shore and Michigan Southern Railway Company, did you include

a portion of their capital stock in which you had an ownership as being employed in this state, or not?

A. We did not. The capital stock of the Lake Shore and Michigan Southern Railway owned by the New York Central was divided upon the basis of the amount of road mileage of the Lake
69 Shore in the State of New York compared with the total road mileage of the Lake Shore Railroad.

Q. Now, Mr. Foulds, the items of cash and cash assets, ownership in other lines, real estate, etc., fuel and supplies, bonds bought for account sinking fund and abolition of grade crossing suspense account, all of them were correct as in the original return, were they not?

A. I believe they were, that is right.

F. E. WILLIAMSON, being duly sworn, testified as follows:

By COUNSEL: Where do you reside Mr. Williamson, and how and where are you employed?

A. I reside in New York City, and am employed as chief clerk to the Superintendent of Freight Transportation of the New York Central Railroad.

Q. How long have you been employed by the company and in what line of service?

A. I have been in the employ of the company about seven years, working in various capacities in the freight service in the Division Superintendent's office and later on in the office of the Superintendent of Freight Transportation.

Q. How long have you been in that office?

A. About a year and a half.

Q. Have your duties there made you familiar with the method of reporting the whereabouts of cars and the companies in whose service they are and change of hands from one company to another?

A. They have.

Q. And with the data that is received and kept by the company concerning those deliveries?

A. They have.

Q. Mr. Williamson, have you, at my request, prepared a record of some several car movements of cars off the lines, or to and
70 from and off of the lines of the company?

A. Yes, these were prepared under my direction.

Q. And prepared from the data that you speak of in the possession of the company?

A. Yes, from the original record.

Q. And what you have to say as to their being correctly transcribed from the record?

A. I believe them to be correct.

Q. For instance, car number 31,772, from Schenectady to Clearwater, South Carolina, that means, does it, that the car left the company's line at Schenectady on the 6th of March, 1902?

A. No, sir, the car was loaded at Schenectady for Clearwater, South Carolina, via Canandaigua—left our line at Canandaigua.

Q. On the 8th of March?

A. Yes, sir.

Q. And when did that car come back to the possession of the New York Central Company?

A. Was returned to us on July 2d of the same year.

Q. By what company?

A. By the Erie.

By COUNSEL: Without examining into detail each of these, I offer this in evidence.

Objected to by Mr. Merrill, for the reason that it does not show the fact that any of the equipment of the New York Central and Hudson River Railroad Company was continuously and exclusively employed during the year in question outside the State by any company, corporation or individual, nor does it show the fact that the New York Central and Hudson River Railroad Company did any business with such equipment outside the State of New York.

By COUNSEL: Of course, it is of no consequence whether we did business with it, or somebody else did business with it. We
71 offer it for the purpose of showing the general course of business by which our cars left our lines.

Objection overruled.

Received and marked "Exhibit B."

By COUNSEL: I desire also to offer in evidence the same record of car movements that were received in the other case.

Deputy Comptroller TIMERMAN: Is this offered for the purpose of proving that these cars were operated exclusively outside the State of New York, or that they were operated at all outside the State of New York by the New York Central Company?

By COUNSEL: No.

Deputy Comptroller TIMERMAN: Inasmuch as it isn't claimed that these exhibits will prove either of those facts, and as matter of fact it isn't claimed, I suppose that that really was the fact?

By COUNSEL: No, our cars are going to and from us and back and forth between other people daily and hourly.

By Deputy Comptroller TIMERMAN: Then it will be received. Marked "Exhibit B-1."

By COUNSEL: Now, I offer record of car movements as contained in papers on appeal from order, proceedings 1900, in case in the Court of Appeals, pages 53 to 59 inclusive.

Received subject to the same limitations.

Marked "Exhibit C."

Q. Calling your attention, Mr. Williamson, to the record of movements of car 41,278, as shown on page 53, of the Court of Appeals case, tax 1900, state, if you please, where that car was destined to when it left the company's line?

A. You ask me New York Central 41,278, where it was destined?

Q. Yes?

A. Detroit, Michigan.

72 Q. Car number 41,038, where was it destined to?

A. I have no destination on that.

Q. Car number 59,578?

A. Destined Chicago, Illinois.
Q. Car number 63,158?
A. Chicago, Illinois.
Q. Car number 18,236, where was it destined to?
A. Grand Rapids, Michigan.
Q. Car number 63,123?
A. Cleveland Transfer, Ohio.
Q. Car number 63,176?
A. Edison, Ohio.
Q. Car 64,431?
A. Chicago, Ill.
Q. Car number 61,831?
A. San Francisco, California.
Q. Car number 14,035?
A. Delivered Lake Shore, December 20th, 1901.
Q. Car number 27,941?
A. Joliet, Illinois.

Q. Now what do you say as to dates of year in which those cars left the company's possession?

A. All these movements were made in 1902, with the exception of car New York Central, 14,035, which was delivered to the L. S. & M. S. at East Buffalo, December 20th, 1901.

Q. What do you say, Mr. Williamson, as to whether the car movements as recorded in the records to which your attention has been called are or are not fairly illustrative of the general course of business in the handling of the company's freight cars?

A. The cases cited are fairly illustrative.

Q. State to the Comptroller what the general or uniform custom is, if there is such, with reference to general service freight cars, as to their return when they have reached the destination for which they left the possession of the owning company?

A. It is not the common practice to return cars empty—they are ordinarily used for loading either at the point at which made empty, or some adjacent point, and worked home in that way.

Q. And who determines about how these cars shall be used
73 when thus in the hands of a company other than the owner?

A. There are certain general rules for the handling of foreign equipment, but as it works out practically the control of the cars is entirely in the hands of the line upon which they are located.

Q. The company has for the time the possession of them?

A. Exactly.

Q. By what method is the owning company advised when its cars pass from the possession of one foreign company to another?

A. It is the practice of practically all of the railroads of the United States to report delivery of cars to owners; that is, when one road turns over a car to another they report to owner of that car the date of delivery and the line to which delivered.

Q. To illustrate, is this fairly illustrative of what you mean—if a car of the New York Central was in the possession of the Canadian Pacific and that company had lading for point on Oregon Short Line, and should load the car and transfer it to the Oregon Short

Line Company in the ordinary course of business the Canadian Pacific would at once report that delivery to the New York Central?

A. They would.

Q. And in turn, as the Oregon Short Line would in the course of transportation, or otherwise, deliver that car to another company—for instance, the Union Pacific—the Oregon Short Line would report that delivery to the New York Central?

A. They would, provided it was a New York Central car.

Q. What are the customary methods, if there are such, that the owning company resorts to or avails itself of as a means of insuring delivery back to it of its cars in the hands of other companies; that is to say, is there a recognized time at which they have a right to
74 demand such return, and if so what is it and what are the methods of enforcing compliance with it?

A. As a general rule, the railroad companies rely upon the so-called per diem charge to effect return of their cars, or at least movement of them, this charge being twenty cents per car per day up to thirty days; but the owning line has a right to serve a penalty notice on any road which holds a car over twenty days, and if the car is not delivered off the line on which this penalty notice is served in the next ten days, the holding road then becomes responsible for a penalty rate on that car of one dollar per day.

Q. That is, eighty cents in addition to twenty?

A. In addition to twenty.

Q. And how is this notice given?

A. Given by the prescribed printed form under the rule of the American Railway Association.

Q. And how generally are these rules or customs that you have spoken of observed by the railroads of the country?

A. They are very generally observed.

Q. You have spoken of the charge per diem for cars held by companies other than the owning company,—how long has that been the method of charge for such cars?

A. Since July 1st, 1902.

Q. And prior to that time what was the basis of charge?

A. Prior to that time the basis of charge was mileage made at agreed rates.

Q. And what was the customary form of reporting that mileage made—was it in such form as to give specific numbers of cars, or merely a lump for mileage stated as the mileage made of cars of the owning company upon the reporting company's road for a given time?

A. It was the practice to report a lump sum representing the mileage of certain company's cars each month, but at the re-
75 quest of the owning companies in some cases the mileage of certain series of cars was given separately if it was so desired, but in a lump sum not individual car numbers.

Q. Where this report of the mileage of certain series of cars was made separately, as you have stated, what was the occasion for that?

A. It might be that a certain line of stock cars were under lease

or some special arrangement in connection with a certain series of cars.

Q. By which do you mean it became necessary for the lessee company to know just what mileage those cars was to be reported to them?

A. Exactly.

Q. What is the usual custom with reference to coal cars, particularly with them in this respect, different from general service freight cars, as to their being returned empty?

A. Well, coal cars, of course, as a general proposition, are wanted at the mines for loading, so those cars are not used in the same general way that box cars are, but they are returned for loading either on the rails of ow-ing road, or some coal connection.

Q. In what State are the coal cars of the New York Central operated by it loaded?

A. Principally in Pennsylvania.

Q. What is the fact as to whether a considerable percentage of the cars of this company loaded upon or adjacent to its Pennsylvania lines pass at Newburry Junction from the lines of this company to other lines and thus on to their destination without going in the State of New York at all?

A. I cannot give a percentage figure, but certainly a very large number of cars are so handled.

Q. Carrying coal to tidewater via routes other than the Central Company's routes from Newburry Junction?

76 A. Or to points on southern lines other than tide.

Q. Are you able to state approximately the percentage of this company's cars, freight cars, which were used off of its lines during the tax year in question, ending October 31st, 1902?

A. My recollection is something over sixty per cent.

By Mr. MERRILL:

Q. Mr. Williamson, what do you mean when you say that sixty per cent. of freight cars of the New York Central and Hudson River Railroad Company are used outside the State of New York?

A. I mean that if at any time you were to make a count of the freight cars of the New York Central and dividing them, those in the State and those out, that out of every hundred cars you would find about sixty outside the State of New York; that condition would be generally true.

Q. That is, that during the year sixty per cent. of their equipment would be off outside the State all the time?

A. Yes, sir.

Q. Well, you don't mean to say that sixty per cent. of equipment of the New York Central and Hudson River Railroad Company is continuously and exclusively outside the State of New York?

A. I don't mean to say that any particular car is continuously and exclusively outside the State of New York, but I mean to say that on an average about sixty per cent. of total equipment is outside the State of New York.

Q. Relatively what part of equipment of people in connection with

whom they do transportation business is in the State of New York, in hands of New York Central and Hudson River Railroad Company, to take place of this other equipment?

77 Objected to by counsel, on the grounds that it is incompetent, irrelevant and immaterial.

Objection overruled; exception taken.

A. Well, I can't say as to that.

Q. Well, is it not a fact that there is a great deal of such equipment here upon the lines of New York Central Railroad Company at all times?

Same objection; same ruling; exception.

A. It is a fact that we handle a considerable number of foreign cars at all times.

Deputy Comptroller TIMERMAN: I will ask to have you furnished a statement of the cars of outside railroads that are on this road, on the New York Central lines in place of this last answer, in which you state you couldn't definitely answer the question.

Counsel answers for the witness that the company will undertake to furnish such information, if practicable to obtain it, but objects to the subject matter called for by the question, objects to it being received in evidence on the ground that it is incompetent, irrelevant and immaterial to the questions here under consideration.

Objection overruled; exception.

Deputy Comptroller TIMERMAN: I would also like to ask for a copy of the rules you mention that govern this subject between railroads?

By COUNSEL: Yes, sir.

By COUNSEL: Now, I wish to offer in evidence the Constitution of Massachusetts, Part 2, Chap. 1, Sect. 1, Art. 4; also the statutes of Massachusetts, Chapter 13, entitled "The Taxation of Corporations" and the "Taxation of Corporate Franchises." That is

78 to say, on page 128, Public Statutes of Massachusetts, of 1882, page 128, is where this chapter begins and has this title. Now, on page 138, under the subject entitled "Taxation of Corporate Franchises" section 38, on page 139 of the same volume, section 39 and section 40 on page 140 of the same volume, section 42 on page 142 of the same volume, sections 53 and 54 on page 143, section 56 on page 144, sections 60, 61, 62; also acts and resolves passed by the general Court of Massachusetts in the year 1900 in volume entitled that, at page 464, Chapter 468, "An Act to authorize the lease of the Boston and Albany Railroad to the New York Central and Hudson River Railroad Company, sections 1 and 11 of that act.

The above received and marked "Exhibit C-1 for identification."

By COUNSEL: I offer in evidence also the decision of the Supreme Judicial Court of Massachusetts, Attorney-General against Bay State Mining Company, 99 Mass. 148. I also offer in evidence the decision of the case, first, in the Circuit Court, I am not able to give volume of it now—that is, United States Circuit Court, and the review of that decision in the Supreme Court of the case of the West-

ern Union Telegraph Company against Massachusetts, reported in 125 U. S. 530.

By Mr. MERRILL: I object to the admission of this as testimony on the ground that it is immaterial, irrelevant and incompetent, and has no bearing whatever upon the tax laws of the State of
79 New York, or the operation of such tax laws. That the laws of Masaschusetts or any other State cannot reach over into and operate under the laws of the State of New York, because such an operation would make their laws extra-territorial.

Deputy Comptroller TIMERMAN: These portions of the Constitution, also the statutes and the decisions, I presume, not having read them, refer to the taxation of franchises in the State of Massachusetts?

By COUNSEL: Yes; that is, they include that. The franchise is not taxed separately as it is here; it is included in the bulk valuation.

By Deputy Comptroller TIMERMAN: Now, do you expect to offer proof of paying franchise tax pursuant to those laws of Massachusetts?

By COUNSEL: It was conceded that our leases require us to pay a tax on leased property, and that includes franchise.

By Deputy Comptroller TIMERMAN: Of course, if you expect to prove payment of a tax, of course, with that agreement I might receive them, but if there is to be nothing offered here on that subject I do not see how the bare laws would be material.

By COUNSEL: I offer the laws themselves for the very purpose of showing what tax they provide for.

By Deputy Comptroller TIMERMAN: The mere provision for the tax I would be inclined to hold as immaterial, unless you agree to state that you expect to supplement it by proof of the actual
80 imposition of the franchise tax and the collection thereof.

By COUNSEL: I could do that, but haven't provided myself with it.

The last offer received and marked "Exhibit C-1, for identification."

By Deputy Comptroller TIMERMAN: The sections of the Constitution and the statutes, together with the decisions, are excluded for the time being. I reserve the right, however, to receive them if later in the testimony it appears that a tax was actually paid on the franchise of the New York Central and Hudson River Railroad Company, pursuant to these laws.

Exception taken to the exclusion.

By COUNSEL: I now offer the following laws of the State of New Jersey: General Public Laws of 1888, pages 269 to 287, being Chapter 208, entitled "An act to revise and amend 'An Act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four." Also General Public Laws of 1888, pages 376, 377, being Chapter 259, entitled "An Act to amend an act entitled "An act to revise and amend 'An act for the (taxation) of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four, which was approved

March twenty-seventh, one thousand eight hundred and eighty-eight." Also General Public Laws of 1891, pages 165, 166, being Chapter 98, entitled "A Supplement to an act entitled "An act to revise and amend 'An act for the taxation of railroad and
81 canal property,' approved April tenth, one thousand eight hundred and eighty-four, approved March twenty-seventh, one thousand eight hundred and eighty-eight."

Same objection. Same ruling. Same exception.

Same received and marked "Exhibit D, for identification."

By COUNSEL: I now offer in evidence the Laws of the Commonwealth of Pennsylvania, Session of 1889, Number 332, page 420, entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June Anno Domini one thousand eight hundred and seventy-nine," page 427, section 19. Also of the session of 1891, number 200, page 229, entitled "An act to provide, etc." At page 233, Section 4 and following, setting forth Section 20 of the act as amended. Also, the same State, session of 1893, number 288, page 353, the title of the act and section 1, setting forth section 21 of the former act as therein amended. Also, session of 1889, number 332, at page 431, section 23, same session laws, page 437, section 31.

Same ruling. Same objection. Exception.

Marked "Exhibit E, for identification."

By COUNSEL: Now, I offer in evidence the decisions of the Courts of Pennsylvania, as follows:

Commonwealth against Susquehanna & Schuylkill R. R. Co., 14 C. C., 440.

Pullman Palace Car Company against Commonwealth, 107 Pa. State, 156 and 141 U. S., 114.

82 Also Commonwealth against D., L. & W. R. R. Company, 145 Pa., 96.

Commonwealth against N. Y., P. & O. R. R. Co., 188 Pa., 169.

Same objection. Same ruling. Exception.

Marked "Exhibit F, for identification."

It is agreed that the evidence offered and the rulings with reference thereto in the proceeding regarding the tax for the year ending October 31st, 1902, shall be regarded and dealt with in the same manner with reference to the proceeding for the tax year ending October 31st, 1903, except so far as regards the evidence with reference to the particular amounts for that year, and except the evidence with regard to the M. D. T. stock, and that subject only to the exception noted in all respects, the same evidence may be regarded as having been offered and dealt with in this proceeding as it was in proceeding for 1902.

It is further stipulated that the figures under the heading "Recapitulation of Distribution of Assets," October 31st, 1903, as shown on the back of the original report herein, shall be accepted as correct, subject only to these exceptions, namely:

First, the figures under the heading "In New York State" as "stocks of other companies," $16,552,269.97, should be reduced by deducting therefrom 63.54 per cent. of $2,597,400.

Second, that of the item under "Outside New York" as "Cost of road and equipment, $19,817,142.24," of this amount $414,540.86 represents an investment outside of New York State other
83 than equipment, the balance, to wit, $19,402,601.38, represents equipment, upon which the applicant claims exemption from the basis of taxation upon the grounds set up by the testimony in the 1902 proceeding, to wit, that $3,148,216.64 thereof represents the average value of equipment employed by the railroad company on its operated lines outside the State of New York, and the other $16,254,384.74 represents the average value of its equipment used on foreign roads outside the State of New York during the said tax year, as testified to in the 1902 proceedings.

It is the same stipulation for 1904 as for 1903, except where you come to accepting that under the head of "Recapitulation of Distribution of assets October 31st, 1904," the item "Cost of equipment outside the State of New York, $19,960,789.08," consists exclusively of equipment, and that the testimony with reference to the same shall be to the effect that $3,513,619.12 was employed on roads operated by the New York Central and Hudson River Railroad Company outside of the State of New York, and $16,447,169.96 thereof was the average of its cars in the use of foreign corporations outside of the State of New York during the said tax year, as indicated in the testimony with relation to the same ground or matter in the proceedings of 1902.

Papers showing car movements in the year ending October 31st, 1904, offered in evidence.

Received and marked "Exhibit G."

By Mr. MERRILL: Is it admitted by counsel for the com-
84 pany that the New York Central and Hudson River Railroad Company is a railroad corporation, transportation company, organized under the laws of the State of New York, and under the laws of no other State?

By COUNSEL: My application says a railroad corporation, incorporated under the laws of no other State.

By Deputy Comptroller TIMERMAN:

Q. As a transportation corporation?

By COUNSEL: Surely.

85 EXHIBITS.

The following, signed by James H. Foulds, Jr., and Frederick Ely Williamson, was furnished in response to inquiry, to wit:

"The Comptroller asks you to furnish a statement of the several dates when the capital stock was issued, and the amounts issued on the several dates of the capital stock of the New York Central and Hudson River Railroad Company, during the year ending October 31st, 1902," and as and for his answer thereto says that the dates of issue of the increase of capital stock of said company during the year ended October 31, 1902, was as follows:

Date issued.	No. of shares.	Date issued.	No. of shares.
April 21st	3,835	Brought forward	168,539
" 22d	3,981	May 27th	24
" 23d	5,659	" 28th	43
" 24th	4,798	" 29th	18
" 25th	5,232	" 31st	10
" 26th	3,799	June 2d	40
" 28th	11,559	" 3d	14
" 29th	7,267	" 4th	61
" 30th	6,451	" 5th	16
May 1st	7,926	" 6th	13
" 2d	19,897	" 7th	9
" 3d	1,230	" 9th	15
" 5th	1,657	" 10th	15
" 6th	2,170	" 11th	9
" 7th	3,520	" 12th	19
" 8th	2,896	" 13th	36
" 9th	12,514	" 14th	6
" 10th	7,585	" 16th	15
" 12th	53,492	" 17th	10
May 13th	1,130	" 18th	35
86 " 14th	137	May 19th	29
" 15th	125	" 20th	11
May 16th	587	" 21st	6
" 17th	38	" 23d	5
" 19th	95	" 24th	41
" 20th	348	" 25th	5
" 21st	406	" 26th	13
" 22d	34	" 27th	20
" 23d	51	" 30th	52
" 24th	18	July 23d	34
" 26th	102		
	168,539	Total	169,163

In response to the inquiry, to wit:

"I will ask to have you furnish a statement of the cars of outside railroads that are on this road, on the New York Central lines, in place of this last answer, in which you said you couldn't definitely answer the question," and as for his answer thereto says:

Our system of car records and accounts does not embrace accounts of foreign cars in the aggregate which may be employed upon our line. It consists of or includes individual car movements and car mileage in the aggregate. Computation of the estimated number of cars thus employed based on the mileage made on our line would indicate that while the number varies very much at different seasons of the year, the average number of foreign cars employed on the New York Central's operated lines within the State of New York during these respective tax years ending October 31st, 1902, 1903

and 1904, were approximately equivalent to the number of
87 this company's cars operated on foreign lines outside the State during each of such tax years.

And in response to the inquiry, to wit:

"I would also like to ask for a copy of the rules you mentioned that cover this subject between railroads, and for his answer thereto says: The paper hereto attached marked "Exhibit 1," is a correct and complete copy of the rules mentioned.

88 EXHIBIT 1.

The American Railway Association.

CODE OF
CAR SERVICE RULES
AND
CODE OF
PER DIEM RULES
GOVERNING SETTLEMENT FOR THE USE OF
FREIGHT CARS.

CODE OF
CAR SERVICE RULES
ADOPTED OCTOBER 24, 1900;
WITH AMENDMENTS AGREED TO APRIL 24, 1901,
OCTOBER 23, 1901, OCTOBER 28, 1903,
AND APRIL 5, 1905.

7 RULES.

Foreign cars must be promptly returned to the home roads.*

2. Foreign cars may be properly used as follows:

(*a*) Loaded to points on or reached by using the home road.

(*b*) Loaded to intermediate points in the direction of the junctions at which they were received.

(*c*) If returned empty they should be moved over the routes by which they were received.

89 3. Foreign cars may be sent empty in the direction opposite to the junctions at which they were received, for loads to points on or reached by using the home roads, but not otherwise.

Foreign cars must not be sent empty to connecting roads without the permission of the owners, except for switching service. Loaded or empty cars received for switching service must be confined to switching limits, and returned to the home or the delivering road.

When empty foreign cars are delivered by one line to a connection

*NOTE.—Whenever the words "home road" are used in these rules they refer to "The road which owns a car, or upon which the home of a private car is located."

for return loading via the road making the delivery, they must be so loaded and returned.

Rule 3. See page 12.

4. If loaded foreign cars on their return movements are re-consigned and such reconsignments would cause diversions of the cars, the lading must be transferred under the rules governing transfers at points of diversion, if this can be done without injury to it, and the cars must be returned to the owners or to the roads from which they were received. In case the lading is of such a character that it cannot be transferred without injury the cars may be run through as re-consigned, but the facts of the case must be promptly reported to the owners of the cars.

5. Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by proper data for forwarding and accepted by the car inspector of the receiving road.

Unless otherwise arranged between the roads concerned, the receiving road shall be responsible for the cars, contents and Per Diem after receipt of the proper data for forwarding and until they have been accepted by its inspector or returned to the delivering road.

6. The following rates per train mile, of actual distance for any trains using other lines in avoiding washouts or other obstructions, shall be in force unless otherwise arranged between the roads concerned:

Fifty cents per train mile for either a passenger or a freight train handled by its own engine and crew, together with the actual cost of pilotage, and with fuel and incidental supplies, at cost plus ten per cent., and water at fifty cents per tank; in case the engine and crew are furnished by the line whose track is used, the charge shall be one dollar per train mile, with no charge for fuel, water and engine supplies.

The road for which the train is detoured shall pay the regular Per Diem and mileage to the owners of the cars in the train, including the road owning the track, if any of its cars shall be in the detoured train. All mileage charges shall be at actual distance over the detoured route.

7. The following rates for the use of passenger equipment shall be in force unless otherwise arranged between the roads concerned.

(A) The rate for coaches, dining cars, chair cars, parlor cars, combined passenger cars and postal cars, shall be 3 cents per mile of actual distance; and for baggage, express, mail storage, combined baggage-express, combined baggage-mail, and combined baggage-mail-express cars, 1½ cents per mile of actual distance. These rates are to apply when the owners of the cars participate in the business and not when the cars are hired to other lines.

(B) The per diem rate for coaches, dining cars, chair cars, parlor

cars, combined passenger cars and postal cars, hired at other
91 than mileage rates, shall be five dollars per day, and for bag-
gage, express, mail storage, combined baggage-express, combined baggage-mail, and combined baggage-mail-express cars, three dollars per day, subject, however, to agreement between the parties interested.

8. When a per diem rate is charged for the use of passenger equipment, as provided for in Rule 7, the total number of hours of all cars of the same class shall be calculated on a basis of twenty-four hours for each day and the charge made accordingly; any fraction of a day over the aggregate number of days of twenty-four hours each to be counted as one day; it being understood that the minimum charge shall be one day for each car.

When necessary to haul cars empty over the roads owning them, or intermediate roads for delivery to the borrowing roads, the tariff rate for such cars shall be charged the borrowing roads for hauling the cars from the points where they left service to the points of connection with the borrowing roads and return; the charge for
10 the empty haul to be named to the borrowing roads at the time the agreement to loan cars is made.

Rule 8. See page 12.

9. The car service charge for delay in loading or unloading a freight car shall be one dollar a day after forty-eight hours from the time of delivery of the car for loading or unloading, not including Sundays or legal holidays, except where rates are fixed by Statute or local Car Service Associations.

Proper notice shall be provided in bills of lading, tariffs and expense bills, notifying shippers and consignees of the charge.
92 Charges for the delay of cars shall not be refunded except on the approval of the transportation officer designated by each road; at points where Car Service Association Rules are in force such additional regulations shall prevail as those rules may provide.

10. When any freight car is detained on a road by reason of a railroad error, the Car Service charges which may have accrued against shipper or consignee during the time such car is held awaiting proper data shall be cancelled; and the erring road shall pay to the road holding the car for the time the car is held until sufficient data is received to release it, the rate established by the Per Diem Rules for freight cars.

Where car service associations exist, the facts in the case shall be certified to the road upon which the Per Diem accrues by the manager of the Car Service Association, the claim against the erring road being made direct by the holding road.

11. New freight cars shall be stenciled when built with actual light weight, date of weighing and capacity. Steel cars shall be re-weighed and re-stenciled within the first year thereafter and wooden cars at the end of the first and second years.

All cars which have received general repairs shall be
11 weighed and stenciled, with the actual weight, immediately before being put back into service.

Any car without stenciling shall be immediately weighed and

stenciled. New weights of foreign cars shall be reported to car owners.

12. The maximum excess allowed over the marked capacity of freight cars shall not exceed 10 per cent. of such marked capacity.

93 13. The placing of advertisements or placards of any kind by shippers upon freight cars is prohibited.

12 QUESTIONS.

ON VARIOUS POINTS UNDER THE CAR SERVICE RULES AND DECISIONS OF THE COMMITTEE ON CAR SERVICE WHICH HAVE BEEN APPROVED BY THE ASSOCIATION.

RULE 3.

"Will you kindly advise me whether it is the intention to allow railroad companies to take switch cars and move them out on their lines for loading to owners? Rule 3 of the Code of Car Service Rules, adopted October 24th last, does not discriminate between switch cars and those received in through business."

In answer to this question the Committee's reply is "No."—*October* 23, 1901.

"Referring to the first paragraph of Rule 3 in the Code of Car Service Rules adopted by The American Railway Association October 24, 1900, which reads as follows:

"Foreign cars may be sent empty in the direction opposite to the junctions at which they were received for loads to points on or reached by using the home roads, but not otherwise."

"Will you kindly advise me your construction of this rule? Do the closing words 'but not otherwise' prevent the loading of a car in an opposite direction for the purpose of securing a load to points on or reached by using the home road, while permitting the cars to be sent empty for the same purpose?"

In reply to this question the answer of the Committee is that *it does.—October* 23, 1901.

RULE 8.

"In paying the per diem for cars under the provisions of Rule 8, is it the intention of the Committee that the aggregate number of hours of all cars hired to another line from time to time during a current month, or any other period for which bill is rendered, should be taken and divided by the aggregate number of hours by
94 twenty-four to find the number of days and fractions thereof for a basis of settlement; or is it the intention of the Committee to make charges and settlement on a basis of each individual car?"

Answer.—Rule 8 provides that, "the total number hours of all cars of the same class shall be calculated on a basis of twenty-four hours for each day and the charge made accordingly;" and it is, therefore, not the intention of the Committee to have charges and settlements made on a basis of each individual car.—*October* 23, 1901.

13 CODE OF

PER DIEM RULES

GOVERNING SETTLEMENT FOR THE USE OF FREIGHT CARS.

IN EFFECT JULY 1, 1905.

ADOPTED APRIL 24, 1902;
WITH AMENDMENTS AGREED TO OCTOBER 28, 1903,
APRIL 27, 1904, OCTOBER 26, 1904,
AND APRIL 5, 1905.

14 ## PER DIEM RULES AGREEMENT.

The subscribing railroad company promises and agrees with each railroad company severally which heretofore or hereafter may have subscribed and filed a like agreement with the Secretary of The American Railway Association, that the subscriber will abide by the rules governing settlement for the use of freight cars, as adopted by the Association and designated "Per Diem Rules" on the
95 minutes of its proceedings; this agreement to continue until withdrawn by three months' previous notice in writing to the Secretary of the Association.

15 ## DEFINITIONS.

HOME CAR.—A car on the road to which it belongs.

FOREIGN CAR.—A car on a road to which it does not belong.

PRIVATE CAR.—A car having other than railroad ownership.

HOME.—A location where a Car is in the hands of its owner.

HOME ROAD.—The road which owns a car, or upon which the home of a private car is located.

HOME ROUTE.—The line of intermediate roads over which a foreign car was moved from home.

HOME JUNCTION.—A junction with the home road.

HOME ROUTE JUNCTION.—A junction on the home route.

SWITCHING SERVICE.—The movement of a car to be loaded or unloaded, or the movement of a car between railroads, at a charge for the service rendered within designated switching limits, the road performing the service not participating in the freight rate.

17 ## PER DIEM RULES.

GOVERNING SETTLEMENT FOR THE USE OF FREIGHT CARS.

For Interpretations, see pages 22 to 25.
For Decisions, see pages 26 to 104.

1. The rate for the use of freight cars shall be 20 cents per car per day which shall be paid for every calendar day, and shall be known as the per diem rate.

RULE 1.—See Interpretation No. 25.

96 2. Days shall be reckoned by subtracting the date of receipt from the date of delivery. The day of receipt should be disregarded, and payment made for day of delivery.

A road receiving and delivering a car on the same date shall not pay the Per Diem for that day.

RULE 2.—See Interpretation No. 9.

3. A road shall have the right to demand the return of its car after it has been twenty days consecutively on any road. If the car is held by the road more than ten days after the date of such notice on the prescribed form (L), making thirty days in all, thereafter a penalty rate of 80 cents per day in addition to the per diem rate shall be paid by such road for the further use of that car.

RULE 3.—See Interpretations Nos. 10, 12, 13, 14, 15, 16, 20, 25 and 26, and Decisions Nos. 15 and 22.

4. All railroads, including ferry lines, shall be responsible to the car owner for amounts accruing for the use of a car at the established rates, whether such car is in road service or switching service, until the car has been delivered to the owner or to another road.

RULE 4.—See interpretations Nos. 5 and 25, and Decisions Nos. 1, 16 and 17.

5. An arbitrary amount for each car in switching service may be reclaimed by the switching line from the road for which the service was performed. This amount shall be based upon the aver-
18 age number of days actually required and determined by the roads directly interested for each local territory.

RULE 5. See Interpretations Nos. 7, 11, 18 and 19, and Decisions Nos. 6, 8, 9, 10, 12, 13, 14, 18, 19, 20, 21 and 23.

6. In case a road delivers an empty foreign car without the consent of the owner to a road which does not pay Per Diem; or if a road permits the loading or re-consigning of a foreign car without
97 the consent of the owner to such road it shall be responsible to the owner for the payment of an amount equal to the Per Diem accruing on the car while on such road.

In case the road so delivering or authorizing the delivery of a foreign car connects directly with the road which does not pay per Diem, penalty shall accrue as if delivery had not been made.

RULE 6.—See Interpretation No. 6 and Decision No. 13.

7. When home route cards have been requested under the Master Car Builders' Rules, the Per Diem shall cease from the date of request to owner.

When a car has been destroyed and reported under the Master Car Builders' Rules the Per Diem shall cease from the date of notice to owner.

RULE 7.—See Interpretations Nos. 4 and 8 and Decision No. 5.

8. When a car is detained awaiting the receipt of repair material from its owner, the Per Diem shall cease from the date the necessary material is ordered from the owner until the date when it is received by the road holding the car.

RULE 8.—See Interpretations Nos. 12, 13, 17 and 21.

9. The Interchange Reports shall close at midnight, and shall include all cars exchanged upon the date named unless otherwise

noted thereon. The reports must be sent to the car record office on each day whether cars are exchanged or not.

In cases where there are different standards of time at junction points the time of the more easterly reckoning shall be used.

19 The Interchange Reports to the car record office from Junction points must be signed by the agents or other authorized representatives of both roads on the prescribed form, the receipt of cars delivered being thereby acknowledged. Car Service Rule

98 5 governs the delivery of cars.* The time of delivery of cars upon interchange tracks of connecting lines shall, *prima facie*, be the time given by the delivering roads.

RULE 9.—See decisions 2, 4 and 7.

10. The Junction Report for each day will be made to car owners on the prescribed form (D) as promptly as possible after the receipt of the Interchange Report for that day.

11. Within thirty days after the end of each calendar month, car owners shall be furnished with a Per Diem Report for that month, on the prescribed form, showing the number of days each car has been in service upon the road making the report.

Statements of corrections or omissions in Per Diem Reports must be presented within one year from the date when the Per Diem report to which they relate has been received. This will not prevent the continuance of any case after the period named, if it has been previously opened, even though the claim should eventually rest upon some road other than the one originally addressed.†

RULE 11. See Interpretations Nos. 1, 2, 3 and 9.

20 12. The settlement of amounts accruing for the use of cars and reclaims under Rule 5 shall be made monthly without regard to reclaims pending under Rules 13, 14 and 15.

12. The settlement of amounts accruing for the use of cars and reclaims under Rule 5 shall be made monthly without re-

99 *gard to reclaims pending under Rules 13, 14 and 15.*

13. When reclaims are made for allowances, under Rules 14 and 15, or on account of special conditions, they must be made by the designated transportation officer of the road which pays the Per Diem to the designated transportation officer of the road from which the allowance is reclaimed.

---

*Car Service Rule 5.

5. Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by proper data for forwarding and accepted by the car inspector of the receiving road.

Unless otherwise arranged between the roads concerned the receiving road shall be responsible for the cars, contents and Per Diem after receipt of the proper data for forwarding and until they have been accepted by its inspector or returned to the delivering road.

†This paragraph will not apply to statements bearing on amounts accruing prior to July 1, 1905.

14. A road failing to receive promptly from a connection cars upon which it has laid no embargo shall be responsible to the connection for the Per Diem on cars held for delivery, including the home cars of such connection.

If such failure to receive shall continue for more than three days, the delinquent line shall thereafter in addition be responsible for the Per Diem on all cars wherever in transit which are thus held back for delivery.

It shall be the duty of a connection intending to reclaim such Per Diem allowance to notify the delinquent line daily of the total number of cars so held for it, and when required, to furnish the initials and numbers of the cars.

RULE 14.—See Interpretations Nos. 20, 23 and 24, and decisions Nos. 3, 11 and 26.

15. When a road gives notice to a connection that for any reason it cannot accept cars in any specified traffic, thereby instituting an embargo, it should receive cars already loaded with such traffic at the time such notice is issued. If it does not receive such cars the road holding them may reclaim Per Diem from the road placing the embargo for the number of days such cars are held not exceeding the duration of the embargo.

100 After the date of the notice a road must not load or reconsign cars in such traffic to the road issuing the notice.

All such notices must be given by telegraph, by the embargoing road, to its immediate connection and by it transmitted as

21 may be necessary.

RULE 15.—See Interpretations Nos. 20, 22 and 23.

16. These rules shall not apply to private cars.

17. To interpret these rules and to settle disputes arising under them an Arbitration Committee of five members shall be appointed by the Committee on Car Service. Three members of the Arbitration Committee shall be a quorum.

In case any question or dispute arises under these rules it may be submitted to the Arbitration Committee through the Secretary of the Association on abstract. The abstracts shall briefly set forth the points at issue and each party's interpretation of the rules upon which its claim is based. The Arbitration Committee shall base its decisions upon the rules and the abstracts submitted, and its decisions shall be final. Should one of the parties refuse to furnish the necessary information the Arbitration Committee shall use its judgment as to whether it can properly decide. All decisions shall be reported to the Association through the Committee on Car Service.

In case a question shall arise not covered by the rules the roads disagreeing may, by mutual consent, submit such questions to the Arbitration Committee.

The Committee on Car Service may appoint a secretary for the Arbitration Committee, who shall be paid by the Association. The other expenses of the Arbitration Committee shall be divided equally between each of the parties to the dispute and the Association.

101 The minimum charge to each road shall be $10, payable in advance. The expenses shall be first paid by the Associati[illegible]a

and then billed to the parties concerned by the Treasurer of the Association.

22 *Interpretations of the Code of Per Diem Rules Rendered by Arbitration Committee.*

Question No. 1. A foreign car received and delivered the same day, should it appear on the Per Diem Report or not?

Answer. The car should be reported by car number as having earned no Per Diem.

Question No. 2. A foreign car received July 31st and delivered to a connection August 5th, should it appear on July Per Diem Report?

Answer. Car number need not appear on July report.

Question No. 3. A foreign car received July 26th and delivered to a connection August 5th, should it show five days in July account and five days in August account?

Answer. Yes.

Question No. 4. (*Note.*—Refers to rule in effect prior to January 1, 1904.)—If a road has a foreign car in a general worn-out condition, and under the Master Car Builders' Rules asks the car owner for proper cards to move the car home, are they responsible for the Per Diem during the time they are holding car for these cards, or would it be proper to construe Rule 7 as meaning that Per Diem will cease from the date that correspondence commences with the owner as to whether car will be repaired or returned to owner?

Answer. The words "When a car has been destroyed, or so damaged as to require an appraisement," in Rule 7 refer to cars
102 actually destroyed or condemned to be destroyed, and Per Diem should be paid on all other bad order cars.

Question No. 5. Should new cars en route from builder to owner, empty or loaded, be exempt from Per Diem?

Answer. Yes.

Question No. 6. Is a road responsible to the owner of a foreign car which they deliver to a road which does not pay Per Diem, while on that road, unless it receives from the owner of the car a
23 notice to the effect that their cars are not permitted to go on roads which do not pay Per Diem?

Answer. The road would be responsible for the Per Diem, and it is not necessary for the car owner to issue notice to that effect.

Question No. 7. Is a switching line entitled to reclaim the allowance on its own cars when tendered to it to be switched on account of another line?

Answer. A road cannot reclaim the allowance for the use of its own cars.

Question No. 8. Should Per Diem be allowed on freight cars in July that were totally destroyed in June but not reported to car owners until after July 1st?

Answer. Yes.

Question No. 9. Should Per Diem be paid on cars for July 1, 1902, that were on hand 12.01 A. M., July 1, 1902?

Answer. Yes.

Question No. 10. In case a car is received on the first day of the month, can penalty notice for return of car be dated on the 21st of that month, or must it be dated later?

Answer. Notice may be dated on the 21st.

Question No. 11. Does Rule 5 apply to cars that were in
103 switching service at 12.01 A. M., July 1, 1902?

Answer. Yes, unless otherwise specially agreed. The amount of reclaim is in the hands of the roads interested in each local territory.

Question No. 12. If a road receives a car on the first day of the month; damages it and orders material from owner on the 25th; material is received on the 20th of the following month; penalty notice is served by car owner on the thirtieth day after its receipt, or five days after material is ordered: When should road holding car commence paying the penalty rate?

Answer. Penalty notice takes effect in this case on receipt of material and penalty rate begins ten days thereafter.

Question No. 13. If a road receives a car on the first day
24 of the month; damages it and orders material from owner on the 11th; material is received on the 30th; on the twenty-fifth day after car is received penalty notice is served by car owner: Is this demand for penalty legal or are the rules for the collection of penalty suspended the same as they are for the Per Diem?

Answer Demand for penalty is legal, but does not take effect in this case until ten days after material is received and penalty rate begins twenty days after material is received, as delay to car while awaiting material should not be computed.

Question No. 14. (*Note.*—Refers to rule in effect prior to January 1, 1905.)—If a road sends a penalty notice demanding a return of one of its cars, and before the ten days expire, the road having possession of the car delivers it to a road which does not pay Per
104 Diem, does this delivery release it from the penalty for which the notice has been given?

Answer. Yes.

Question No. 15. (*Note.*—Refers to rule in effect prior to January 1, 1905.)—In case a road has a foreign car for which it is liable for the $1.00 per day, would the delivery to a road which does not pay Per Diem stop the penalty of eighty cents a day?

Answer. Yes.

Question No. 16. Should the penalty rate accruing on a car on a road which does not pay Per Diem be paid by the road responsible for the Per Diem on that car?

Answer. Yes.

Question No. 17. Referring to Rule 8, should Per Diem be paid for date material is ordered, or for date on which material is received?

Answer. For date received.

Question No. 18. If a road handles a car between the junction of another road and a point on its line in a switching district under a

special switching arrangement with the shipper or consignee;
25 under such circumstances is the switching road entitled to a reclaim on the long haul road for the agreed allowance at that point?

Answer. No.

Question No. 19. Does Rule 5 apply when switching charge is assessed on a ton instead of a car basis?

Answer. Yes.

Question No. 20. Under Rules 14 and 15, is the railroad which fails to accept cars responsible for penalty rate as well as the Per Diem Rate?

Answer. Yes.

105 Question No. 21. Referring to Rule 8; when repair material is ordered, should the car numbers be sent to owner of the car if Per Diem is to be waived?

Answer. Yes.

Question No. 22. Under Rule 15 can a road reclaim Per Diem on its own cars?

Answer. Yes.

Question No. 23. In case a car held under Rules 14 or 15 for a certain road, is not delivered to that road, can reclaim be made against such road?

Answer. No.

Question No. 24. Under Rule 14, can the expression "and, when required, to furnish the initials and numbers of the cars," be interpreted to mean that a daily list shall be made which shall include initials and numbers of cars previously reported?

Answer. No.

Question No. 25. Under Rules 1, 3 and 4 must the Per Diem and penalty rate be paid by a road for the "use" of a car, when it is out of repair, unfit for service, or lying idle?

Answer. Yes.

Question No. 26. Under rule 3 and Interpretation No. 20 can penalty be collected by the owner road on its own cars when held for connecting line under Rule 14?

Answer. No.

106 Mr..... .....

.....R.....

....

Form No. (D)

North & South Railroad.

Junction Report of Cars Delivered to Our Connections.

On.....190...

(Printed Signature)
.....

(Title of Officer)
.....

(Address)
.....

x Loaded. — Empty.

Car.		x —	Delivered to (Full Initials)
Full initials.	Number.		

☞ NOTE.—Standard size, $3\frac{1}{4}$ x $5\frac{1}{2}$ inches, including margins.

107

Form No. (L).

NORTH & SOUTH RAILROAD.

Penalty Notice.

(Address and Date.)

..... 190....

Mr. .....

.....

.....

Cars of this Company as enumerated below have been on your line 20 consecutive days and you are hereby notified that unless same are disposed of within 10 days from this date, a penalty of 80 cents per car per day, in addition to the regular per diem rate, will be charged for these cars.

(Printed Signature.)

.....

(Title of Officer.)

.....

Retain original; return copy.

Check.	Car.			Delivered.		Reply.		
	Initials.	Kind.	Number.	By or at.	Date.	Location.	Disposition.	Date.
1								
2								
3								
4								
5								
6								
7								
8								
9								
10								
11								
12								
13								
14								
15								
16								
17								
18								
19								
20								
21								
22								
23								
24								
25								
26								
27								
28								
29								
30								
31								
32								
33								
34								
35								

☞ NOTE.—Standard sizes 8 x 10½ and 8 x 5¼ inches, including margins. Penalty notices should be printed in bright red ink on any color or quality of paper that each road may prefer.

Penalty notices must be mailed in duplicate, the original to be retained by the receiving road; the copy to be returned as an acknowledgment, and bearing notations showing dispositions made of the cars which may have cleared the lines of the receiving road.

No other styles of penalty notices will be used, either of different sizes, different styles or by postal card.

All Penalty notices should be mailed in an envelope bearing the full and complete address, (name, title road, town and state) of the officer to whom sent.

Preferably, Penalty notices should be sent by U. S. Mail only, although in the case of immediate and direct connections, they may be forwarded by Railway service.

EXHIBIT "A" FOR IDENTIFICATION.

New York Central Capital Stock Tax 1902.

Total Assets..... $359,316,025.89
Average Capital Stock at Par..... 123,458,150 00
Average Cash Value 200,156,525.69

Assets Employed.		Capital Stock at Par.		Capital Stock Cash Value.		Tax.
In N. Y. State.	Outside of N. Y. State.	In N. Y. State.	Outside of N. Y. State.	In N. Y. State.	Outside of N. Y. State.	
		Revised Statement.				
227,856,175.92	131,459,849.97	78,289,583.32	45,168,566.68	126,926,986.95	73,229,538.74	190,390.48
		Add 89 % of M D T Stock:				
2,311,686.00		794,227.06		1,287,721.68		1,931.58
		As per Report:				
230,167,861.92	129,148,163.97	79,083,860.38	44,374,289.62	128,214,708.63	71,941,817.06	192,322.06
		Add outside equipment:				
On System 4,780,862.98		1,642,666.78		2,663,175.52		3,994.76
On Foreign Rds. 11,865,528.08		4,076,901.79		6,609,677.01		9,914.52
		Report and Equipment:				
246,814,252.98	112,501,772.91	84,803,428.95	38,654,721.05	137,487,559.16	62,668,966.53	206,231.34
		Add unexplained addition:				
3,593,804.09		1,234,802.74		2,001,923.90		3,002.89
		Basis of Taxation:				
250,408,057.07	108,907,968.82	86,038,231.69	37,419,918.31	139,489,483.06	60,667,042.63	209,234.23

109 EXHIBIT "B."

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6/5, 1905.

.....

.....

DEAR SIR: Below please find movements of N. Y. C. .....
Car number 90110, from Lockport to Oklahoma City.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From Lockport	9	30	'02		M		
To M. C.	10	1	"		M		
To C. Belt	10	3	"		M		
To C. & Alton	10	5	"		M		
To W. Ferry Co.	10	3	"		M		
To Mo. Pac.	10	8	"		M		
To A. T. & S. F.	10	10	"		M		
To 'Frisco System	10	17	"		M		
To Terminal R.R.	11	3	"		M		
To So. Pac.	11	5	"		M		
To Terminal R.R.	..	..	"		M		
To Big Four	11	11	"		M		
To L. S. & M. S.	11	13	"		M		
To N. Y. C.	11	19	"		M		
Del'd to					M		

110 EXHIBIT "B-1."

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6/5, 1905.

.....

.....

DEAR SIR: Below please find movements of N. Y. C. .....
Car number 31772 from Schenectady to Clearwater, S. C.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From Schenectady	3	6	'02		M		
To Canandaigua	3	8	"		M		
To P. R.R.	3	8	"		M		
To Wash. South	3	10	"		M		
To R. F. & P.	3	11	"		M		
To South. Ry.	3	11	"		M		
To N. & W.	4	10	"		M		
To P. & R.	4	13	"		M		
To Erie	5	21	"		M		
To N. Y. C	7	2	"		M		

EXHIBIT "B-1."

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6/5, 1905.

. . . . . .

. . . . . .

DEAR SIR: Below please find movements of N. Y. C. . . . . Car number 56491, from Weehawken to Berlin, Ont.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'k'n	3	17	'02		M		
To Susp. Bridge	3	20	"		M		
To G. T.	3	20	"		M		
To M. C.	4	3	"		M		
To L. S. & M. S.	4	6	"		M		
To N. Y. C.	4	16	"		M		

111

EXHIBIT "C."

EXHIBIT "4" AND EXHIBIT "C" FOR IDENTIFICATION.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 41278 from

C. H. EWINGS, Car Acc't.

FROM	TRAIN. DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central	4/19		Mich. Central	4/19		
Mich. Central	5/10		L. S. & M. S.	5/10		
L. S. & M. S.	6/6		Vandalia	6/6		
Vandalia	6/13		L. S. & M. S.	6/13		
L. S. & M. S.	6/24		Pere Marquette	6/24		
Pere Marquette	7/16		Mich. Central	7/16		
Mich. Central	7/18		Pere Marquette	7/18		
Pere Marquette	7/20		Mich. Central	7/20		
Mich. Central	9/21		Penn. Company	9/21		
Penn. Company	10/17		L. S. & M. S.	10/17		
L. S. & M. S.	10/31		Pitts. & Lake Erie.	10/31		
P. & Lake Erie.	12/8		Penn. R.R.	12/8		
Penn. R.R.	12/9		Penn. Company	12/9		
Penn. Company	12/12		Erie	12/12		
Erie	12/17		Clev., Cinn., Chic. & St. L.	12/17		

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *January* 16*th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 41038 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y Central		4/28		L. S. & M. S.		4/28	
L. S. & M. S.		5/8		Lake Erie & West		5/8	
L. E. & Western		5/20		L. S. & M. S.		5/20	
L. S. & M. S.		6/2		Grand Trunk		6/2	
Grand Trunk		6/19		Mich. Central		6/19	
Mich. Central		7/26		Chic., Milw. & St. P.		7/26	
Chic., Milw. & St. P.		7/29		Mich. Central		7/29	
Mich. Central		8/26		Chic. Junction		8/26	
Chic. Junction		8/31		Mich. Central		8/31	
Mich. Central		10/10		Chic., Rock I. & Pac.		10/10	
C., R. I. & Pac.		10/14		Missouri Pac.		10/14	
Mo. Pac.		10/20		C., R. I. & Pac.		10/20	
C. R. I. & Pac.		11/27		Chicago, Peoria & West.		11/27	
Chicago, Peoria & West.		11/29		Chic. R. I. & Pac.		11/29	
C. R. I. & Pac.		12/1		Ind. Ill. & Iowa		12/1	
I. I. & Iowa		12/2		N. Y. Chic. & St. L.		12/2	
N. Y. C. & St. L.		12/5		Lehigh Valley		12/5	
Cent. of N. J.		1/2		Penn. Railroad		1/2	
Lehigh Valley		12/7		Cent. of New Jersey		12/7	
Penn. R.R.		1/9		Washington South		1/9	

112 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan.* 16*th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 59578 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		4/2		L. S. & M. S.		4/2	
L. S. & M. S.		4/17		Lake Erie & West		4/17	
L. E. & Western		5/8		Cin. Ham. & Dayton		5/8	
Cin. Ham. & Dayton		5/20		L. S. & M. S.		5/20	
L. S. & M. S.		5/23		Mich. Central		5/23	
Mich. Central		6/4		Erie		6/4	
Erie		6/15		Mich. Central		6/15	
Mich. Central		8/20		Tor. Ham. & Buffalo		8/20	
Tor. Ham. & Buffalo		8/21		Mich. Central		8/21	
Mich. Central		9/15		Chic. & Alton		9/15	
Chic. & Alton		9/30		L. S. & M. S.		9/30	
L. S. & M. S.		10/12		Atch. Top. & S. Fe.		10/12	
Atch. Top. & S. Fe.		10/15		Ill. Northern		10/15	
Ill. Northern		10/19		Atch. Top. & S. Fe.		10/19	
Atch. Top. & S. Fe.		10/23		L. S. & M. S.		10/23	
L. S. & M. S.		10/31		Del. Lack. & Western		10/31	
Del. Lack. & Weste'n		11/28		Mich. Central		11/28	
Mich. Central		12/26		L. S. & M. S.		12/26	
L. S. & M. S.		1/1		Penn. R.R.		1/1	

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 63158 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		6/12		L. S. & M. S.		6/12	
L. S. & M. S.		7/11		Ohio Cent. Lines		7/11	
Ohio Cent. Lines		7/18		L. S. & M. S.		7/18	
L. S. & M. S.		8/18		Pere Marquette		8/18	
Pere Marquette		9/8		L. S. & M. S.		9/8	
L. S. & M. S.		9/18		Wabash		9/18	
Wabash		9/28		L. S. & M. S.		9/28	
L. S. & M. S.		10/2		Chic. Mil. & St. P.		10/2	
Chic. Mil. & St. P.		10/5		Union Pacific		10/5	
Union Pacific		10/11		Southern Pacific		10/11	

113 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 18236 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		3/5		Mich. Central		3/5	
Mich. Central		3/6		Pere Marquette		3/6	
Pere Marquette		4/2		Mich. Central		4/2	
Mich. Central		4/10		Chic. Ind. & L'ville		4/10	
Chic. Ind. & Lou.		5/3		Elgin Jol. & Eastern		5/8	
Elgin, Jol. & Eastern		5/8		L. S. & M. S.		5/8	
L. S. & M. S.		5/13		Wheeling & L. Erie		5/13	
Wheeling & L. Erie		6/6		L. S. & M. S.		6/6	
L. S. & M. S.		6/9		Ill. Central		6/9	
Ill. Central		7/2		L. S. & M. S.		7/2	
L. S. & M. S.		8/21		Cin. Ham. & Dayton		8/21	
Cin. Ham. & Dayton		8/24		Louisvl. & N'shville		8/24	
Louisvl. & N'shville		9/24		Penn. Company		9/24	
Penn. Company		11/10		Lake Erie & Western		11/10	
Lake Erie & Western		11/25		Penn. Company		11/25	
Penn. Company		12/20		Clev. Cin. Chic. & St. L.		12/20	

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 63123 from

C. H. EWINGS, Car Acc't.

FROM	TRAIN. DATE. TIME.	TO	L. OR E. DATE. TIME. CON.
N. Y. Central	6/15	L. S. & M. S.	6/15
L. S. & M. S.	6/18	Penn. Railroad	6/18
Penn. Railroad	6/22	L. S. & M. S.	6/22
L. S. & M. S.	6/25	Baltimore & Ohio	6/25
Baltimore & Ohio	7/17	L. S. & M. S.	7/17
L. S. & M. S.	8/1	Penn. Company	8/1
Penn. Company	8/6	L. S. & M. S.	8/6
L. S. & M. S.	8/14	Wheeling & L. E.	8/14
Wheeling & Lake E.	9/5	Mich. Central	9/5
Mich. Central	9/10	Wis. Central	9/10
Wis. Central	9/21	Mich. Central	9/21
Mich. Central	9/26	Chic. Ter. & Trans.	9/26
Chic. Ter. & Trans.	10/7	Chicago Belt	10/7
Chic. Belt	10/8	N. Y. Chic. & St. L.	10/8
N. Y. Chic. & St. L.	10/10	L. S. & M. S.	10/10
L. S. & M. S.	11/5	Chic. Bur. & Quin.	11/5
Chic. Bur. & Quin.	11/20	Chic. Belt	11/20
Chic. Belt	11/20	Mich. Central	11/20
Mich. Central	12/8	Detroit, Tol. & Mil.	12/8
Detroit, Tol. & Mil.	12/21	Penn. Company	12/21

114 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 63176 from

C. H. EWINGS, Car Acc't.

FROM	TRAIN. DATE. TIME.	TO	L. OR E. DATE. TIME. CON.
N. Y. Central	2/11	L. S. & M. S.	2/11
L. S. & M. S.	2/14	C. C. C. & St. L.	2/14
C. C. C. & St. L.	2/17	Ohio Central Lines	2/17
Ohio Central Lines	2/22	Chesapeake & Ohio	2/22
Chesap. & Ohio	3/27	C. C. C. & St. L.	3/27
C. C. C. & St. L.	3/29	Ill. Central	3/29
Ill. Central	4/11	Chic. Ter. & Trans.	4/11
Chic. Ter. & Trans.	4/12	Chic. Belt	4/12
Chic. Belt	4/30	L. S. & M. S.	4/30
L. S. & M. S.	5/16	Chic. Junction	5/16
Chic. Junction	5/20	L. S. & M. S.	5/20
L. S. & M. S.	5/24	Lehigh Valley	5/24
Lehigh Valley	5/28	N. Y., N. H. & H.	5/28
N. Y., N. H. & H.	5/29	Boston & Maine	5/29
Boston & Maine	6/21	N. Y., N. H. & H.	6/21
N. Y., N. H. & H.	7/6	Lehigh Valley	7/6
Lehigh Valley	7/7	Ironton R.R.	7/7
Ironton R.R.	7/8	Lehigh Valley	7/8
Lehigh Valley	7/11	Mich. Central	7/11
Mich. Central	9/12	Lehigh Valley	9/12
Lehigh Valley	9/21	Norfolk & Western	9/21
Norfolk & Western	10/31	C. C. C. & St. L.	10/31
C. C. C. & St. L.	11/2	Grand Rap. & Ind.	11/2
Grand Rap. & Ind.	11/15	Dul. S. Shore & Atl.	11/15
Dul., S. Shore & Atl.	11/17	M. St. P. & S. Ste. M.	11/17
M. St. P. & S. Ste. M.	11/29	Dul. S. Shore & Atl.	11/29
Dul. S. Shore & Atl.	12/3	Grand Rap. & Ind.	12/3
Grand Rap. & Ind.	12/18	Penn. Company	12/18

115 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 64431 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		6/27		L. S. & M. S.			6/27
L. S. & M. S.		7/8		Chic. Ind. & St. L.			7/8
Chic. Ind. & St. L.		7/14		Mich. Central			7/14
Mich. Central		7/30		Det. Tol. & Mil.			7/30
Det. Tol. & Mil.		8/5		L. S. & M. S.			8/5
L. S. & M. S.		8/18		Penn. R.R.			8/18
Penn. R.R.		9/7		N. Y., N. H. & H.			9/7
N. Y., N. H. & H.		9/9		Boston & Maine			9/9
Bost. & Maine		9/17		N. Y., N. H. & H.			9/17
N. Y., N. H. & H.		9/19		Bost. & Maine			9/19
Bost. & Maine		9/24		N. Y., N. H. & H.			9/24
N. Y., N. H. & H.		10/4		Penn. R.R.			10/4
Penn. R.R.		10/22		Penn. Co.			10/22

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *February* 9, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 61834 from C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from							
From N. Y. C.							
To L. S. & M. S.	July	2	1902		M		
From L. S. & M. S.							
To Elgin, Joliet & Eastern	"	6	"		M		
From Elgin, Joliet & Eastern							
To Chicago & No. Western	"	8	"		M		
From Chicago & No. Western							
To Union Pacific	"	10	"		M		
From Union Pacific							
To Southern Pacific	"	14	"		M		
From Southern Pacific							
To Union Pacific	Aug.	8	"		M		
From Union Pacific							
To Southern Pacific	"	11	"		M		
Delivered to Southern Pacific							
Rec'd from Southern Pacific							
From Southern Pacific							
To Atch., Topeka & Santa Fe Coast Line	Dec.	17	"		M		
From Atch., Topeka & Santa Fe Coast Line							
To Southern Pacific	"	18	"		M		

116 New York Central & Hudson River Railroad Co.

New York, *February* 9, 1903.

Dear Sir: Below please find movements of N. Y. C. Car number 14035 from C. H. Ewings, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
N. Y. C.					M		
To L. S. & M. S.....	Dec.	20	1901		M		
From L. S. — M. S.....					M		
To Cleve., Cin., Chic. & St. L...	"	23	"		M		
From Cleve., Cin., Chic. & St. L.					M		
To Norfolk & Western.....	"	28	"		M		
From Norfolk & Western.....					M		
To Cleve., Cin., Chic. & St. L...	Jan.	8	1902		M		
From Cleve., Cin., Chic. & St. L.					M		
To Norfolk & Western.....	"	12	"		M		
From Norfolk & Western.....					M		
To Chesapeake & Ohio.....	"	14	"		M		
From Chesapeake & Ohio.....					M		
To Southern	"	20	"		M		
Del'd to					M		
Rec'd from					M		
From Southern					M		
To Washington Southern.....	Feb.	20	"		M		
From Washington Southern...					M		
To Southern	Mar.	15	"		M		
From Southern					M		
To Baltimore & Ohio.....	"	24	"		M		
From Baltimore & Ohio.....					M		
To Southern	Apr.	21	"		M		
From Southern					M		
To Baltimore & Ohio.....	July	9	"		M		
From Baltimore & Ohio.....					M		
To Southern	"	11	"		M		
From Southern					M		
To Washington Southern.....	Sept.	3	"		M		
Del'd to							
Rec'd from					M		
From Wash. Southern.....					M		
To Southern	Oct.	26	"		M		
From Southern					M		
To Chesapeake & Ohio.....	Nov.	7	"		M		
From Chesapeake & Ohio.....					M		
To Penn. R.R.	Dec.	3	"		M		
From Penn. R.R.					M		
To Chesapeake & Ohio.....	Jan.	4	1903		M		
From Chesapeake & Ohio.....					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to					M		

117 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *February* 9, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 27941 from C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
N. Y. C.					M		
To Mich. Central	June	12	1902		M		
From Mich. Central					M		
To Chic., R. I. & Pac.	"	14	"		M		
From Chic., R. I. & Pac.					M		
To Colo. Midland	"	18	"		M		
From Colo. Midland					M		
To Rio Grande Western	"	20	"		M		
From Rio Grande Western					M		
To Southern Pacific	"	21	"		M		
From Southern Pacific					M		
To Union Pacific	Aug.	8	"		M		
From Union Pacific					M		
To Southern Pacific	Sept.	16	"		M		
Del'd to							
Rec'd from					M		
From Southern Pacific					M		
To Union Pacific	"	22	"		M		
From Union Pacific					M		
To Rio Grande Western	"	23	"		M		
From Rio Grande Western					M		
To Colo. Midland	Oct.	7	"		M		
From Colo. Midland					M		
To Denver & Rio Grande	"	31	"		M		
From Denver & Rio Grande					M		
To Colo. Midland	Nov.	5	"		M		
From Colo. Midland					M		
To Chic., R. I. & Pac.	"	25	"		M		
From Chic., R. I. & Pac.					M		
To					M		
Del'd to							

118 EXHIBIT "C" FOR IDENTIFICATION.

PUBLIC STATUTES OF MASSACHUSETTS, 1882.

(p. 23.) See note, 125 U. S., 531.

EXTRACT FROM THE CONSTITUTION OF MASSACHUSETTS.

Part 2, Chap. 1, Sect. 1, Art. 4, of the Constitution gives the Legislature power "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and persons resident, and estates lying within the said Commonwealth," and also "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured, or being within the same."

(p. 128.) CHAPTER 13.

OF THE TAXATION OF CORPORATIONS.

* * * * * * *

(p. 138.) TAXATION OF CORPORATE FRANCHISES.

SECT. 38. Every corporation chartered by the commonwealth, or organized under the general laws for purposes of business or profit, having a capital stock divided into shares, excepting banks whose shares are otherwise taxable under this chapter, and except those specified in sections forty-three and forty-six, shall annually, between the first and the tenth days of May, return to the tax commissioner, under the oath of its treasurer, a complete list of its shareholders, with their places of residence, the number of shares belonging to each on the first day of May, the amount of the capital stock of the corporation, its place of business, the par value and market value of the shares on the said first day of May. Such return shall, in the case of stock held as collateral security, state not only the
119 name of the person holding the same, but also the name of the pledger and his residence. The returns shall also contain a statement in detail of the works, structures, real estate and machinery owned by said corporation and subject to local taxation within the commonwealth, and of the location and value thereof. Railroad and telegraph companies shall return the whole length of their lines, and the length of so much of their lines as is without the commonwealth; other corporations required to make a return under this section shall also return the amount, value and location of all works, structures, real estate and machinery owned by them and subject to local taxation without the commonwealth; *provided,* that nothing herein contained shall exempt any corporation from making all returns required by its charter.

(p. 139.) SEC. 39. The tax commissioner shall ascertain, from the returns or otherwise, the true market value of the shares of each corporation included in the provisions of the preceding section, and shall estimate therefrom the fair cash valuation of all of said shares constituting its capital stock on the first day of May next preceding, which shall be taken as the true value of its corporate franchise for the purposes of this chapter. He shall also ascertain and determine the value and amount of all real estate and machinery owned by each corporation, and subject to local taxation, and of the deductions provided in the following section, and for this purpose he may take the amount or value at which such real estate and machinery are assessed at the place where the same are located as the true amount or value; but such local assessment shall not be conclusive of the true amount or value thereof.

120 (p. 139.) SECT. 40. Every corporation embraced in the provisions of section thirty-eight shall annually pay a

tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, as determined in the preceding section, after making the deductions provided for in this section, at a rate determined by an apportionment of the whole amount of money to be raised by taxation upon property in the commonwealth during the same current year, as returned by the assessors of the several cities and towns under section eighty-six of chapter eleven, upon the aggregate valuation of all the cities and towns for the preceding year, as returned under sections fifty-four and fifty-five of said chapter; *provided*, that in case the return from any city or town is not received prior to the twentieth day of August, the amount raised by taxation in said city or town the preceding year, as certified to the secretary of the commonwealth, may be adopted for the purpose of this determination; and *provided, further*, that the amount of tax assessed upon polls the preceding year, as certified to the secretary, may be taken as the amount of poll tax to be deducted from the whole amount to be raised by taxation, for the purpose of ascertaining the amount to be raised by taxation upon property. From the valuation, ascertained and determined as aforesaid, there shall be deducted– *First*, in case of railroad and telegraph companies, whose lines extend beyond the limits of the commonwealth, such portion of the whole valuation of their capital stock, ascertained as aforesaid, as is proportional to the length of that part of their line lying without the commonwealth; and also an amount equal to the value, as determined by the tax commissioner, of their real
121 estate and machinery located and subject to local taxation within the commonwealth; *Second*, in case of other corporations, included in section thirty-eight of this chapter an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery, subject to local taxation, wherever situated; *provided*, that, whenever the charter of a corporation provides a different method of ascertaining the valuation of its corporate franchise for the purposes of this chapter, the same shall be ascertained in the method provided in such charter.

* * * * * * *

(p. 140.) SECT. 42. Every corporation or association chartered or organized elsewhere, which owns, or controls and uses, under lease or otherwise, a line of telegraph within this commonwealth, shall make all the returns prescribed in section thirty-eight to be made by telegraph companies within the commonwealth, excepting the list of its shareholders; and shall annually pay a tax at the same rate, and to be ascertained and determined in the same manner as is provided in section forty; and all telegraph lines within the commonwealth controlled and used by such corporation or association, shall, for the purposes of this chapter, be taken and considered as part of its own lines.

* * * * * * *

(p. 142.) SECT. 53. The tax commissioner shall, as soon as may be after the first Monday in August, in each year, notify the treasurer of each corporation, company, copartnership, or association

liable thereto, of the amount of its tax under sections twenty-five, forty, forty-two, forty-five, forty-seven, fifty, and fifty-two, to become due and payable to the treasurer of the commonwealth within thirty days from the date of such notice: *provided*, that it shall not
122 be due and payable earlier than the first day of November. Such notice shall also state that within ten days after the date thereof the said corporation, company, copartnership, or association may apply for a correction of said tax, and be heard thereon before the board of appeal hereinafter established.

(p. 142.) SECT. 54. Any corporation, company, copartnership, or association taxable under the provisions of sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, and fifty-two, neglecting to make the returns required by this chapter, or refusing or neglecting, when required thereto, to submit to the examinations provided for therein, shall forfeit two per cent upon the par value of its capital stock, all which penalties may be recovered by an action of tort, brought in the name of the commonwealth, either in the County of Suffolk or in the county where the corporation is located. If any corporation, company, copartnership, or association fails to pay the taxes required to be paid to the treasurer of the commonwealth under the provisions of said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, he may forthwith commence an action of contract in his own name, as treasurer, for the recovery of the same, with interest at the rate of twelve per cent. per annum until the same are paid. All penalties under this section, and under sections seven, forty-seven, fifty, and fifty-two, may also be enforced, and all taxes under said sections forty, forty-two, forty-three forty-five, forty-seven, fifty, fifty-one, and fifty-two, may also be collected by information brought in the Supreme Judicial Court at the relation of the treasurer of the commonwealth, and upon such information the Court may issue
123 an injunction restraining the further prosecution of the business of the corporation, company, copartnership, or association, until all such taxes due or penalties incurred shall be paid, with interest at the rate aforesaid, and costs. In any proceeding under this section the certificate of the tax commissioner or his deputy shall be competent evidence of all determinations made and notices given by him, and of all values, amounts, and other facts required to be fixed or ascertained by him under this chapter.

* * * * * * *

(p. 143.) SECT. 56. The lessee of the works, structures, real estate, or machinery of any corporation, company, copartnership, or association taxed under sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, shall be liable as well as the lessor to pay the amount of said tax, and upon such payment may, in the absence of any agreement to the contrary, retain the same out of the rent of the property, or recover the same in an action against the lessor.

* * * * * * *

(p. 144.) SECT. 60. The tax on corporate franchises herein im-

posed upon any corporation shall not affect nor prevent the imposition and collection of any other tax now authorized, or that may hereafter be authorized, upon any especial privilege, franchise or business enjoyed or exercised by such corporation.

SECT. 61. Any party aggrieved by the decision of the tax commissioner arising under the provisions of sections twenty-five to fifty-eight inclusive, excepting corporations named in section
124 forty-six, may apply to the board of appeal constituted under the provisions of the following section for a correction of the same.

SECT. 62. The treasurer and the auditor of the commonwealth, together with one member of the council to be named by the governor, shall constitute a board of appeal, to which board any party aggrieved by a decision of the tax commissioner upon any matter arising under this chapter, from his decision upon which an appeal is given, may apply within ten days after notice of such decision for a correction of the same. Upon such appeal said board shall, as soon as may be, give a hearing to such party, and shall thereupon decide the matter in question, and notify the tax commissioner and the party appealing; and such decision shall be final and conclusive as to the rights of the parties affected, although payments may have been made as required by the decision of the tax commissioner appealed from. Any over-payment of tax, determined by the decision of said board of appeal, shall be reimbursed from the treasury of the commonwealth."

ACTS AND RESOLVES PASSED BY THE GENERAL COURT OF MASSACHUSETTS IN THE YEAR 1900.

(p. 464.) CHAPTER 468.

"An Act to Authorize the Lease of the Boston and Albany Railroad to The New York Central and Hudson River Railroad Company.

SECTION 1. Subject to the conditions hereinafter mentioned the consent of the Commonwealth is hereby given to the contract and lease of the railroad, franchises and property of the Boston and Albany Railroad Company, and to a supplemental contract in connection therewith for the sale of certain of its assets, which contracts
125 were made and entered into between the directors of the Boston and Albany Railroad Company and the directors of the New York Central and Hudson River Railroad Company on the 15th day of November in the year eighteen hundred and ninety-nine, and which were severally approved and adopted by the votes of the stockholders owning more than two-thirds of the stock of each of said corporations which was represented and voted upon in person or by proxy at special meetings called separately for that purpose.

* * * * * * *

(p. 466.) SECTION 5. The lessee, so long as it has possession of the said railroad under said lease, shall, so far as the operation of said railroad is concerned, be subject to the provisions of all laws now in force or which hereafter may be enacted concerning railroad corporations incorporated within this Commonwealth.

* * * * * * *

(p. 467.) SECTION 11. Upon any failure to comply with and observe the final decrees and mandates of the supreme judicial court of this Commonwealth, provided for in the foregoing sections of this act, or of any federal court of competent jurisdiction, the consent and authority herein given may be revoked and annulled at any time by the general court, notwithstanding any prior failure to observe and comply with any decree or mandate aforesaid. The remedies provided in this and the preceding sections shall be in addition to and shall not repeal any remedies already existing.

SECTION 12. This act shall take effect upon its passage."

Approved July 17, 1900.

126 "EXHIBIT C–1 FOR IDENTIFICATION."

99 MASSACHUSETTS REPORTS, PAGES 148–154.

THE ATTORNEY GENERAL

vs.

BAY STATE MINING COMPANY.

The tax of a certain percentage of the par of its capital stock, imposed by the St. of 1865, c. 283, Sec. 8, on every company or association "having an office or place of business within this Commonwealth for the direction of its affairs or transfer of shares," and "incorporated elsewhere" "for the purpose of engaging without the limits of the Commonwealth in the business of coal mining or other mining, quarrying, or extracting carbonaceous oils from the earth, or for the purpose of purchasing, selling or holding mines or lands without the Commonwealth," is warranted by the Constitution of the Commonwealth, and is not in conflict with the Constitution of the United States; nor was said sec. 8 in any respect repealed or annulled by the St. of 1866, c. 291.

Information filed December 13, 1867, on the St. of 1865, c. 283, sec. 14, at the relation of the treasurer and receiver-general of the Commonwealth, seeking a decree for payment by the defendants, a corporation organized under the law of Michigan for the purpose of engaging in the business of mining copper in that State, of taxes in 1866 and 1867, under the St. of 1865, c. 283, sec. 8, the material part of which is printed in the margin;* and for an injunc-

*"Every corporation chartered by this Commonwealth, or organized under the general laws, for the purpose of engaging, without the limits of the Commonwealth, in the business of coal mining or other mining, quarrying or extracting carbonaceous oils from the earth, or for the purpose of purchasing, selling or holding mines or lands without the Commonwealth, and every such company or association, incorporated elsewhere, and having an office or place of business within the Commonwealth for the direction of its affairs or transfers of shares, shall, semi-annually, between the first and the tenth day of June and December, make a return, under the oath of its treasurer, or president, to the tax commissioner, of the whole amount of its capital stock, as fixed by the corporation, on the first day respectively of May and November next preceding, and pay to the treasurer of the Commonwealth a tax of one twentieth of one per cent. upon said capital stock at the par thereof."

127 tion against further prosecution of business in the Commonwealth by the defendants, until the same should be paid with interest.

The information alleged the maintenance by the defendant corporation of an office or place of business, namely, the office of its treasurer, in Boston, for the direction of its affairs and transfer of shares; and the making of returns by its treasurer to the tax commissioner in June and December, 1866, and June, 1867, in conformity with the statute; that in truth and fact the par value of its capital stock as fixed on May 1 and November 1, 1866, and May 1, 1867, was thus returned; and that "by reason thereof said corporation became liable and was bound to pay to the treasurer of the Commonwealth" the taxes alleged being one-twentieth of such par value at the three dates last named.

The answer substantially admitted the facts alleged in the information; but denied "that said corporation owes the taxes mentioned in said information to said Commonwealth and interest thereon, or any part of said taxes and interest, or is or was liable and bound to pay to the treasurer of said Commonwealth said taxes;" alleged that the defendant corporation "is a foreign corporation owning real estate in the state of Michigan, and employing its capital stock in the working of a mine in said state, that said capital stock is owned in part by citizens of states other than the
128 state of Massachusetts, that nearly all the contracts for labor at said company's mine and for materials purchased for use at said mine are entered into in Michigan, and drafts for the payment of the same, drawn by the agent of the company at the mine on the treasurer of the company, residing in Boston, are delivered to and received by the laborers, and parties furnishing materials, as payment;" further denied "that said Commonwealth has the right or power, under the Constitution of the United States, or under the Constitution of the said Commonwealth, to tax said corporation, said corporation being a foreign corporation and receiving all its corporate powers and privileges from the state of Michigan," and finally alleged "that the provisions of said St. of 1865, c. 283, so far as it is pretended that the same are applicable to said defendants in requiring the payment of a tax to the treasurer of said Commonwealth are repealed by the provisions of the St. of 1866, c. 291.

The case was reserved by Foster, *J.*, on the information and answer for determination by the full court.

C. Allen, Attorney General, and J. C. Davis, for the Commonwealth, besides cases cited for the defendants and in the opinion, cited Tremont Bank *v.* Boston, 1 Cush. 145; Angell & Ames on Corporations, sec. 486a; DeGroot *v.* Van Duzer, 20 Wend. 390; Bank of Augusta *v.* Earle, 13 Pet. 589; Corfield *v.* Coryell, 4 Wash. C. C. 380; Blackstone Manufacturing Co. *v.* Blackstone, 13 Gray, 488; McCulloch *v.* Maryland, 4 Wheat. 429; Providence Bank *v.* Billings, 4 Pet. 564; Nathan *v.* Louisiana, 8 How. 82; Biddle *v.* Commonwealth, 13 S. & R. 409; Commonwealth *v.* Milton, 12 B. Monr. 212; Fire Department *v.* Noble, 3 E. D. Smith, 440;
129 Fire Department *v.* Wright, *Ib.* 453; State *v.* Delaware, Lackawanna & Western Railroad Co., 1 Vroom, 473.

J. G. Jackson, for the defendants. 1. The Commonwealth has no authority to tax the capital stock of a foreign corporation. The legislature has power to impose "proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident and estates lying within the Commonwealth;" and also to impose "reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities whatsoever, brought into, produced, manufactured or being within the same." Const. of Mass., part 2, c. 1, sec. 1, art. 4. But this gives no authority to impose taxes on property or persons not subject to their jurisdiction. The capital stock, as such, of the defendant corporation, is beyond its jurisdiction.

In Portland Bank *v.* Apthorp, 12 Mass. 252, and Commonwealth *v.* Hamilton Manufacturing Co., 12 Allen, 298, the defendants being domestic corporations, it was held that under the term "commodity" their charters were included, and that the legislature, which created and sold these commodities, might, as the price of the commodity, in the one case levy an excise or duty each year on the franchise of the bank, measured by the capital stock which it permitted the bank to hold, and in the other case measure the value of the commodity sold by the market value of the shares. But in the case at bar, though the legislature may compel the defendant corporation to pay a license for maintaining an office for the transaction of part of its business in Massachusetts, yet, having no control over the charter, it cannot levy a tax on the capital stock, all of which
130 is employed in another state. Massachusetts does not grant the defendant's franchise; and so cannot tax it. The principle that a state, in order to tax a corporation on its franchise, must have granted the charter, or have the corporate property within its limits, seems to be expressly recognized by the St. of 1864, c. 208, secs. 6, 9, and by the very St. of 1865, c. 283, secs. 5, 7, relating to railroad and telegraph companies extending beyond the limits of Massachusetts or incorporated by other states. See also Eastern Bridge *v.* The County, 9 Barr, 415.

The real and personal estate of the corporation may be taxed to the corporation by any power within whose jurisdiction it may be found; and the interest of the shareholders is personal to them, and may be taxed to them in their places of domicil, whether the shares so held by them are shares of foreign or domestic corporations, and notwithstanding, in the case of foreign corporations, that such corporations have paid taxes on their franchises and corporate property to the power which created them. Gordon *v.* Appeal Tax Court, 3 How. 133; Angell & Ames on Corporations, sec. 458; Dwight *v.* Mayor & Aldermen of Boston, 12 Allen 316; Commonwealth *v.* Berkshire Insurance Co. 98 Mass. 25. But if Massachusetts has jurisdiction for taxation over such of the shares of this Michigan corporation as are held by citizens of Massachusetts, it does not follow that it has therefore such jurisdiction over all the shares of the capital stock of the corporation, part of which are owned by citizens of other states, and that it may so tax property in other states belonging to citizens of other states.

2. The St. of 1865, c. 283, on which this information is based, so far as applicable to the taxation of the capital stock of foreign mining corporations to such corporations, and not to the individ-
131 ual holders of shares in such stock, is repealed by the statute of 1866, c. 291, sec. 2, and the power to tax the shares in such corporations remitted to the towns and cities where the stockholders reside.

3. By the answer it appears that nearly all the contracts for labor at the mine in Michigan, and for materials purchased, are entered into in Michigan, and drafts for payments in fulfillment of these contracts are drawn on the treasurer of the company. The information asks the court to enforce the statute by enjoining the treasurer from paying these drafts; which would be in contravention of the Const. of the U. S., art. 1, sec. 10, forbidding any state from passing any law impairing the obligation of contracts.

WELLS, *J.*:

The defence in this suit seems to rest upon the supposition that the existence and organization of the corporation, the functions and capacities with which it is endowed by the law creating it, are alone what constitute the franchise or "commodity," which is the subject of the tax or excise imposed by the St. of 1865, c. 283. If it were so, there would be much force in the argument that, when these are derived exclusively from the authority of another state, they are not proper subjects of state taxation here.

But we think this is a too limited view of the matter. It is not merely the creation of corporate functions and privileges, or the conferring of rights and franchises by the legislature, which entitles the state to tax the possessor of such privileges and rights. The exercise of powers or privileges, and even of occupations without especial powers or privileges, may be equally subjected to such taxation, under the constitutional authority to "impose and levy reasonable duties and excises." It was so considered in the case of
132 Portland Bank *v.* Apthorp, 12 Mass. 252; and the tax of one per cent. laid upon the capital stock of the bank, was justified upon principles equally applicable to individuals transacting similar business, and to brokers, factors, auctioneers, &c. The tax was not sustained on the ground that the corporation derived its existence from the state which imposed the tax; on the contrary, one principal question in that case was, whether, by the charter, the state had not conferred upon the bank the privilege of doing the business for which it was created, without restriction, so as to exempt the corporation from the requisition of any tax or duty afterwards levied upon the exercise of that privilege.

That decision is sufficient for the present case. The tax is, indeed, in form, levied upon the capital stock of the corporation. But it is not merely the franchise of incorporation that is the basis of the tax, nor is it the capital, regarded merely as property. In case of domestic corporations, it is based upon a valuation which involves an estimate of all the advantages, present and prospective, which the stock is supposed to derive from the combination of capital and the

exercise of all the rights and privileges enjoyed by the corporation in the conduct of its business. Commonwealth *v.* Hamilton Manufacturing Co. 12 Allen, 298.

When the exercise of corporate functions, authorized by the state, is extended beyond the limits of the state, as in railroads and telegraph lines, the tax is apportioned accordingly. In the case of mining companies whose mines are without the state, the tax is limited by the "par" of the stock, and the tax upon foreign companies is founded upon the express consideration of "having an office or place of business within the Commonwealth for the direction of its affairs or transfer of shares." A mining corporation
133 which comes within the terms of this provision has its domicil of business within the Commonwealth, as completely as one that is organized under our General Statutes for the prosecution of a like enterprise. A corporation which seeks, by its agents, to establish a domicil of business in a state other than that of its creation, must take that domicil, as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there. The state may deny to foreign corporations the right to transact their business, hold property, or exercise any corporate function whatever within its limits. Or it may permit them to exercise such privileges upon terms prescribed by law, as has long been done in relation to insurance companies. Erie Railway Co. *v.* New Jersey, 2 Vroom 531. The provisions of the statute in question are founded upon this right of exclusion or of conditional admission. Exclusion is the remedy provided to enforce compliance. The very defence to the suit implies the enjoyment of valuable rights and privileges within the Commonwealth, which a foreign corporation can only exercise by comity and the permission of the state.

The court are all of opinion that the tax upon the defendant corporation is legal; that it is warranted by the Constitution of the Commonwealth, and is not in conflict with any provision of the Constitution of the United States, and that sec. 8 of the St. of 1865, c. 283, is in no respect repealed or annulled by the St. of 1866, c. 291.

The Commonwealth is therefore entitled to an injunction restraining the further prosecution of the business of the defendant corporation within the Commonwealth, excepting the payment of debts already contracted, until all taxes due under said act shall be paid with interest and costs.

134 "EXHIBIT C-1 FOR IDENTIFICATION" (Con't).

33 FEDERAL REPORTER, PAGE 129.

ATTORNEY-GENERAL
v.
WESTERN UNION TELEGRAPH COMPANY.

(Circuit Court, D. Mass., November 28, 1887.)

1. Telegraph Companies—Taxation—Power of State.

Pub. St. Mass., c. 13, sec. 40 provides that every railroad and telegraph company shall pay annually a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, after deducting from such valuation such portion as is apportionate to the length of the line lying without the state; and also an amount equal to the value of the real estate and machinery located and subject to local taxation within the state. Held, that the right to tax telegraph companies under this statute is not impaired by Rev. St. W. S. secs. 5263–5265, conferring certain privileges on telegraph companies.

2. Constitutional Law—Interstate Commerce—Taxation of Telegraph Companies.

A tax levied under Pub. St. of Mass., c. 13, sec. 40, providing for the taxation of railroad and telegraph companies is not void as repugnant to the Const. U. S., Art. 1, sec. 8, which gives congress power to regulate commerce between the several states.

(Sub-note 1. Respecting interstate commerce in general see Pearson *v.* Distillery Co. (Iowa), 34 N. W. Rep. 1 and note.)

In Equity.

Harvey N. Shepard, Ass't Att'y General, for complainant.
Geo. S. Hale, for defendant.

COLT, *Justice:*

135 This is an information filed by the attorney general of Massachusetts under section 54, chapter 13, of the Public Statutes of Massachusetts, to collect a tax claimed to be due, and for an injunction restraining the defendant from the further prosecution of its business until such tax is paid.

The defendant is a telegraph company, organized under the laws of the State of New York, for the purpose of business and profit, and having a capital stock divided into shares. On or about June 12, 1867, the company filed its written acceptance with the postmaster general of the United States of the restrictions and obligations required by the act of congress of July 24, 1866, relating to telegraphs.

Rev. St. secs. 5263–5269. By section 6263 it is provided that any telegraph company organized under the laws of any state shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States; over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States. The information was originally filed in the state court April 27, 1886, and removed to this court by the defendant. On May 1, 1885, the defendant owned or controlled, under lease or otherwise, 146,052.60 miles of telegraph line, of which 2,833.05 were situate within the state of Massachusetts. In September, 1885, the tax commissioners, in the manner required by the laws of the state, estimated the fair cash valuation of the stock of the corporation on May 1, 1885, at $47,500,000, and allowed as credits for shares held by the company unissued and stocks in other companies outside of its system $8,773,622.70, leaving $38,713,924. The commissioner considered the valuation of the corporate franchise of
136 the defendant subject to taxation in the state to be $750,952, and he assessed a tax thereon of $10,618.46. More than 2,334.55 miles of the line within the state are over, under or across post roads, but the commissioner ignored this fact. The defendant has continually transmitted messages over its lines on said post roads between the several departments of the United States Government at rates fixed by the post-master general as required by the act of July 24, 1866. (Rev. St. sec. 5266.) It is impossible for the company to determine what portion of any sums received were for services performed in the state in the transmission through the state or any portion thereof of messages received or delivered out of it, or what portion of any sums received were for services not on lines of said post roads; but approximately 70% of the receipts were for messages received and delivered out of the state. The defendant on May 1, 1885, owned a large amount of real estate subject to local taxation out of the state of Massachusetts on which there was assesed and paid more than $48,000 of taxes. In the assessment of the tax herein complained of no allowance or deduction was made for this, and in ascertaining the valuation of the defendant's franchise for the purposes of taxation no account was taken of said real estate or buildings or the taxes paid thereon. The position taken by the defendant is that this tax levied under Chap. 13 of the Pub. Statutes of Massachusetts is illegal—*first:* Because of its operation and effect upon a franchise granted by the United States and used for its purposes and benefit; *second:* because it is a tax upon interstate or foreign commerce; *third:* because it *it* is in effect levied upon real estate located and taxed in another state. There is nothing in the act of July 24,
1866, conferring certain privileges on telegraph companies
137 who shall choose to take the benefit of its provisions, which impairs the right of a state to tax the property or franchise of the corporation in the manner exercised by the state of Massachusetts in the present case; nor is such a tax void as repugnant to sec. 8 of art. 1 of the Constitution, which gives congress power to

regulate commerce with foreign nations and among the several states.

In Telegraph Co. *vs.* Texas, 105 U. S. 460, the Supreme Court held a state statute imposing a specific tax on each message which it transmitted beyond the state, or which a public officer sends over its lines on business of the United States was void so far as it was a tax on interstate business, or a tax by a state on the means employed by the United States to execute its constitutional powers. It will be observed that this was a direct tax on each message sent out of the state as well as a direct tax on messages sent by the government. In the present case, however, the tax is imposed upon the shares of capital stock which represent the property and franchise of the corporation. Every tax on the property or franchise of a telegraph company may operate to increase the cost of messages sent, but that does not make such a tax invalid. In the case just referred to Chief Justice Waite, speaking for the court, says: "The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by congress, occupies in Texas the position of an instrument of foreign and interstate commerce and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper manner on account of its occupation and its business." The precise question now presented is
138 "whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the state, or sent by public officers on the business of the United States."

It was this last question that was determined in the negative. In the Delaware Railroad Tax Case, 18 Wall. 206, an act of the legislature of Delaware imposing a tax quite similar to the one now complained of was held not to conflict with the power of congress to regulate commerce. The court in that case observes: "The state may impose taxes on the corporation as an entity existing under its laws as well as upon the capital stock of a corporation or its separate corporate property. And the manner in which its valuation shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

The question of what constitutes a tax upon foreign or interstate commerce had frequently come before the Supreme Court for adjudication and I find no case which sustains the view taken by the defendant in this case. The question is carefully reviewed in the recent cases of Fargo *v.* Michigan, 121 U. S. 230; 7 Sup. Ct. Rep. 857, and Steamship Co. *vs.* Pennsylvania, 122 U. S. 326; 7 Sup. Ct. Rep. 1118.

Sec. 40, Chap. 13, Pub. Stat. of Massachusettts provides that every corporation embraced in the provision of sec. 38 shall pay a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock at a certain rate deter-
139 mined as therein set forth, deducting in the case of railroads and telegraph companies whose lines extend beyond the limits

of the commonwealth such portion of the whole valuation of their capital stock as is proportional to the length of that part of their line lying within the commonwealth; and also an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery located and subject to local taxation within the commonwealth; in case of other corporations an amount shall be deducted equal to the value of their real estate and machinery subject to local taxation wherever situate. The deductions in the case of corporations generally of all real estate and machinery wherever situate and in the case of railroad and telegraph companies whose lines extend beyond the limits of the commonwealth of only the real estate and machinery lying within the state, is a question of legislative discretion, and no valid ground has been suggested upon which this court for this reason has a right to declare a tax so levied invalid in whole or in part. I think a decree should be entered for the complainant and that an injunction as prayed for should be granted unless the amount taxed is paid by the defendant within 30 days from the entry of a decree in the cause. Decree for complainant.

United States Reports, October Term, 1887, No. 125, pages 530-555.

WESTERN UNION TELEGRAPH COMPANY
v.
THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

No. 1325. Argued February 15, 1888. Decided March 19, 1888.

140 The privilege conferred upon telegraph companies by Rev. Stat. sec. 5263 carries with it no exemption from the ordinary burdens of taxation in a State within which they may own or operate lines of telegraph.

The laws of Massachusetts impose a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that State, the value of which is to be ascertained by comparing the length of its lines in that State with the length of its entire lines; and such a tax is essentially an excise tax, and is not forbidden by the fact of the acceptance on the part of the company of the rights conferred on telegraph companies by Rev. Stat. sec. 5263, nor by the commerce clause of the Constitution.

The principles established by the statutes of Massachusetts for regulating the taxation of corporations doing business within its limits, whether domestic or foreign, do not appear to be unfair or unjust.

A state statute which authorizes an injunction to be issued to restrain a corporation organized under the laws of another State, whose taxes are in arrear, from prosecuting its business within the State until the taxes are paid, is void so far as it assumes to confer power upon a court to so restrain a telegraph company which has ac-

cepted the provisions of Rev. Stat. sec. 5263 from operating its lines over military and post roads of the United States.

In Equity. The bill was filed by the Attorney General of the Commonwealth of Massachusetts, at the relation of the Treasurer of that State, and on behalf of the Commonwealth, in the Supreme Judicial Court of that State on the 27th of April, 1886. It averred that certain proceedings had been taken in accordance with law and under the Statutes of that State, to assess taxes in that State
141 in the year 1885 upon the capital stock of the Western Union Telegraph Company, a corporation owning, controlling, and using, under lease, or otherwise, lines of telegraph within that Commonwealth for purposes of business or profit. The provisions in the Constitution and laws of Massachusetts which were relied upon are printed in the margin.*

(*) 1. *Extract from the Constitution of Massachusetts.*

Part 2, Ch. 1, Sect. 1, Art. 4, of the Constitution gives the Legislature power "to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying within the said Commonwealth," and also "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the same."

2. *Extracts from the Public Statutes of Massachusetts.*

"Chapter 13, Sect. 38. Every corporation chartered by the Commonwealth, or organized under the general laws, for the purposes of business or profit, having a capital stock divided into shares, excepting banks whose shares are otherwise taxable under this chapter, and except those specified in sections forty-three and forty-six, shall annually, between the first and the tenth day of May, return to the tax commissioner, under the oath of its treasurer, a complete list of its shareholders, with their places of residence, the number of shares belonging to each on the first day of May, the amount of the capital stock of the corporation, its place of business, the par value and market value of the shares on said first day of May. Such return shall, in the case of stock held as collateral security, state not only the name of the person holding the same, but also the name of the pledger and his residence. The returns shall also contain a statement in detail of the works, structures, real estate and machinery owned by said corporation and subject to local taxation within the commonwealth and of the location and value thereof. Railroad and telegraph companies shall return the whole length of their lines, and the length of so much of their lines as is without the commonwealth; other corporations required to make a return under this section shall also return the amount, value and location of all works, structures, real estate, and machinery owned by them and subject to local taxation without the commonwealth: *provided*, that nothing herein contained shall exempt any corporation from making all returns required by its charter.

"Sect. 39. The tax commissioner shall ascertain, from the returns

or otherwise, the true market value of the shares of each
142 corporation included in the provisions of the preceding section, and shall estimate therefrom the fair cash valuation of all of said shares constituting its capital stock on the first day of May next preceding, which shall be taken as the true value of its corporate franchise for the purposes of this chapter. He shall also ascertain and determine the value and amount of all real estate and machinery owned by each corporation, and subject to local taxation, and of the deductions provided in the following section; and for this purpose he may take the amount or value at which such real estate and machinery are assessed at the place where the same are located as the true amount or value; but such local assessment shall not be conclusive of the true amount or value thereof.

"SECT. 40. Every corporation embraced in the provisions of section thirty-eight shall annually pay a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, as determined in the preceding section, after making the deductions provided for in this section, at a rate determined by an apportionment of the whole amount of money to be raised by taxation upon the property in the commonwealth during the same current year, as returned by the assessors of the several cities and towns under section eight'-six of chapter eleven, upon the aggregate valuation of all the cities and towns for the preceding year, as returned under sections fifty-four and fifty-five of said chapter: *provided,* that in case the return from any city or town is not received prior to the twentieth day of August, the amount raised by taxation in said city or town the preceding year, as certified to the secretary of the commonwealth, may be adopted for the purpose of this determination; and *provided, further,* that the amount of tax assessed upon polls the preceding year, as certified to the secretary, may be taken as the amount of poll tax to be deducted from the whole amount to be raised by taxation, for the purpose of ascertaining the amount to be raised by taxation upon property. From the valuation, ascertained and determined as aforesaid, there shall be deducted,—*First,* in case of railroad and telegraph companies, whose lines extend beyond the limits of the commonwealth, such portion of the whole valuation of their capital stock, ascertained as aforesaid, as is proportional to the length of that part of their line lying without the commonwealth, and also an amount equal to the value as determined by the tax commissioner, of their real estate and machinery located and subject to local taxation within the commonwealth: *second,* in case of other corporations, included in section thirty-eight of this chapter, an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery, subject to local taxation, wherever situated: *Provided,* that, whenever the charter of a corporation pro-
vides a different method of ascertaining the valuation of its
143 corporate franchise for the purposes of this chapter, the same shall be ascertained in the method provided in such charter."

"SECT. 42. Every corporation or association chartered or organized elsewhere, which owns, or controls and uses, under lease or

otherwise, a line of telegraph within this commonwealth, shall make all the returns prescribed in section thirty-eight to be made by telegraph companies within the commonwealth excepting the list of its shareholders; and shall annually pay a tax at the same rate, and to be ascertained and determined in the same manner as is provided in section forty; and all telegraph lines within the commonwealth controlled and used by such corporation or association, shall for the purposes of this chapter, be taken and considered as part of its own lines."

"SECT. 53. The tax commissioner shall, as soon as may be after the first Monday in August in each year, notify the treasurer of each corporation, company, copartnership, or association liable thereto, of the amount of its tax under sections twenty-five, forty, forty-two, forty-five, forty-seven, fifty, and fifty-two, to become due and payable to the treasurer of the commonwealth within thirty days from the date of such notice: *provided*, that it shall not be due and payable earlier than the first day of November. Such notice shall also state that within ten days after the date thereof the said corporation, company, copartnership, or association may apply for a correction of said tax, and be heard thereon before the board of appeal hereinafter established.

"SECT. 54. Any corporation, company, copartnership, or association taxable under the provisions of sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, and fifty-two, neglecting to make the returns required by this chapter, or refusing or neglecting, when required thereto, to submit to the examinations provided for therein, shall forfeit two per cent. upon the par value of its capital stock; all which penalties may be recovered by an action of tort, brought in the name of the commonwealth, either in the county of Suffolk or in the county where the corporation is located. If any corporation, company, copartnership, or association fails to pay the taxes required to be paid to the treasurer of the commonwealth under the provisions of said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, he may forthwith commence an action of contract in his own name, as treasurer, for the recovery of the same, with interest at the rate of twelve per cent. per annum until the same are paid. All penalties under this section, and under sections seven, forty-seven, fifty, and fifty-two, may also be enforced, and all taxes under said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, may also be collected by information brought in the supreme judicial court at the relation of the treasurer of the commonwealth, and upon such information the court may issue an injunction restraining the further prosecution of the business of the corporation, company, copartnership, or asso-
144 ciation, until all such taxes due or penalties incurred shall be paid, with interest at the rate aforesaid, and costs. In any proceeding under this section the certificate of the tax commissioner or his deputy shall be competent evidence of all determinations made and notices given by him and of all values, amounts, and other facts required to be fixed or ascertained by him under this chapter."

"SECT. 61. Any party aggrieved by the decision of the tax commissioner arising under the provisions of sections twenty-five to fifty-eight inclusive, excepting corporations named in section forty-six, may apply to the board of appeal constituted under the provisions of the following section for a correction of the same."

SECT. 62. The treasurer and the auditor of the commonwealth, together with one member of the council to be named by the governor, shall constitute a board of appeal, to which board any party aggrieved by a decision of the tax commissioner upon any matter arising under this chapter, from his decision upon which an appeal is given, may apply within ten days after notice of such decision for a correction of the same. Upon such appeal said board shall, as soon as may be, give a hearing to such party, and shall thereupon decide the matter in question, and notify the tax commissioner and the party appealing; and such decision shall be final and conclusive as to the rights of the parties affected, although payments may have been made as required by the decision of the tax commis-ioner appealed from. Any overpayment of tax, determined by the decision of said board of appeal, shall be reimbursed from the treasury of the commonwealth."

"CHAPTER 109, SECTION 1. Every company incorporated for the transmission of intelligence by electricity shall possess the powers and privileges, and be subject to the duties, restrictions, and liabilities, prescribed in this chapter."

"SECT. 2. Each company may, under the provisions of the following section, construct lines of electric telegraph upon and along the highways and public roads, and across any waters within the commonwealth, by the erection of the posts, piers, abutments, and other fixtures (except bridges) necessary to sustain the wires of its lines; but shall not incommode the public use of highways or public roads, nor endanger or interrupt the navigation of any waters."

"SECT. 3. The mayor and aldermen or selectmen of a place through which the lines of a company are to pass shall give the company a writing specifying where the posts may be located, the kind of posts, and the height at which and the place where the wires may run. After the erection of the lines, having first given the company or its agents opportunity to be heard, they may direct any alteration in the location or erection of the posts, piers, or abutments, and in the height of the wires. Such specifications and decisions shall be recorded in the records of the city or town."

145 The nature of the proceeding, in the valuation of the property of the company for the purposes of the assessment of the tax, are sufficiently stated in the Report of the Examiner *infra*.

The bill averred that the taxes had not been paid, and were still due and owing to the Commonwealth, and prayed the court "to order and decree that said sum due for taxes as aforesaid shall be paid to said Commonwealth by the said corporation, with interest thereon, together with the costs of this information, and to grant unto your informant a writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the said corporation and its officers, agents, and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums, due to the said Commonwealth as aforesaid for taxes as aforesaid shall have been fully paid, with interest and costs," and for further and other relief.

On motion of the defendant the cause was, on May 13, 1886, removed to the Circuit Court of the United States, and on the 29th day of the same May the answer of the defendant was filed in that court.

The answer set forth that the defendant was a corporation organized in the State of New York, and under the laws of that State; that it owned, controlled, and used many lines of telegraph in various parts of the United States, and in the State of Massachusetts, largely in that State over and along the post roads of the United States which had been declared to be such and over, under, and across navigable waters of the United States in or adjoining that State, and that on the 5th day of June, 1867, it had accepted the provisions and obligations of the act of July 24, 1866, 14 Stat. 221, c. 230

146 (now Rev. Stat. sec. 5263); (*) that thereby it became entitled to construct and maintain its lines over the post roads and over, under, and across the navigable waters of the United States, and became bound to transmit the telegrams of the United States over its lines at rates to be fixed by the Postmaster General, and that no state legislation could prevent its occupation of post roads for that purpose; that its lines extend to and from Massachusetts to other states, and to Washington, and connect with the lines of other companies doing business in this country and outside of the United States and beyond the seas; that while it was operating its lines in Massachusetts it was called upon to make returns of its capital stock, &c., to the tax commissioner of the State according to the provisions of secs. 38, 39, 40, 41, and 42 of c. 13 of the Public Statutes of the State, and made a return as follows:

(*) See *infra*, page 547, for this statute.

"Western Union Telegraph Company.

"TREASURER'S OFFICE, NEW YORK, *June* 25, 1885.

"Hon. Daniel A. Gleason, tax commissioner of the Commonwealth of Massachusetts.

"SIR: I, Roswell H. Rochester, treasurer of the Western Union Telegraph Company, hereby return that on the first day of May, 1885, said corporation held its principal place of business at the City of New York.

"Its capital stock was	$80,000,000.00
The whole number of its shares was 800,000.	
The par value of each share was	100.00
The market value of each share was	59.37½
The value of the real estate owned by the corporation without the State of Massachusetts was	3,058,933.82
147 The value of the real estate owned by the corporation within the State of Massachusetts was nothing.	
The total number of miles of line owned or leased was 146,052.60.	
Of which the number of miles (not on post roads of the United States and excluding 2,334.55 miles which were on post roads of the United States) within the State of Massachusetts was 498.50.	
Total property, 800,000 shares, at $59.37½ per share	47,500,000.00
This includes—	
Real Estate	3,058,933.82
Two hundred and nine three-fourth shares held by this company unissued, at $59.37½	12,453.90
Stocks in other companies outside of our system, not included in above statement of miles of line.	8,773,622.70
Balance value of 146,052.60 miles of line	35,654,989.58
Value, at same rate, of said 498.50 miles as the valuation of the corporate franchise of said company for taxation under the laws of Massachusetts	121,695.97

"This return includes the lines and property of the American Union Telegraph Company, the Franklin Telegraph Company, the Mutual Union Telegraph Company, and the Gold and Stock Telegraph Company as part of the Western Union lines.

"Respectfully yours, R. H. ROCHESTER,
Treasurer."

148 The answer then set forth the action of the tax commissioner upon this return and respecting the valuation of the property of the company for the purposes of taxation (*); and continued:

(*) For these proceedings see the Report of the Examiner, *infra*, pp. 539, 542.

"And this respondent does not deny but admits that its property in said State of Massachusetts is subject to taxation the same as other property, and that it may be taxed in a proper way thereon, yet it respectfully submits and avers that this respondent does not derive its existence from the laws of said State, or derive the right to have and exercise its said franchises, rights and privileges from said State, or hold them subject to its control, and that said franchise tax is clearly not a tax on its property in any legal sense, and cannot be held valid as such; that it is in the nature of an excise on the exercise of all the franchises, rights and privileges enjoyed by this respondent in the conduct of its business, and a tax on its operations in such exercise; that, while it is claimed by the officers of said State and by said attorney general that the laws imposing said tax are founded on the alleged right of said State to refuse to this respondent the right or permission to transact its business or exercise its functions, franchises, rights and privileges within said State, except for such price and on such terms and conditions, including the payment of such taxes as said State may see fit to prescribe and assess, and to compel the performance of, and to exclude this respondent from such transaction or exercise if the same are not performed and obeyed:

"Yet this respondent avers that said franchise tax has not and cannot have this or any legal foundation, and that it includes and is a tax or assessment on the rights, privileges and franchises
149 granted and secured to this respondent by the United States by the said act of Congress, and on the use thereof by this respondent as an instrument of commerce and as a government agent for the transmission of public business by means thereof, and on its operation in said State, which said State cannot limit, control, refuse, or tax.

"That even if said tax could in any form be so properly levied and assessed on the use of such rights and privileges for other purposes, which this respondent denies, it is not only impossible in this case to indicate or designate the portion of the burden of said franchise tax on said use as an instrument of commerce and as a government agent or on any use for other purposes, but that the mode of valuation thereof specifically prescribed by said act does in terms include and designate as a subject of taxation the franchise exercised on that portion of this respondent's lines constructed, maintained and used in the exercise and enjoyment of said rights and privileges, and that the said tax bears upon the whole machine without distinction and indistinguishably as well upon the faculty of receiving and transmitting the messages of the government of said United States as on that of receiving and transmitting messages of individuals, and as well upon the faculty of receiving and transmitting through said State messages sent and received in and for the purposes of foreign and interstate commerce, as upon that of receiving and transmitting other messages wholly within said State.

"And this respondent further avers that if said franchise tax could in form be legally so levied and assessed as to operate upon only something legally subject to taxation by said State by any mode of

estimate or valuation resembling that prescribed by said laws,
150 based upon a valuation of its shares, deducting real estate locally taxed in said State, it would be and is unjust and not proportional not to deduct from said valuation the amount of real estate owned by and subject to local taxation and actually taxed out of said State, both because the laws of said State allow such deduction from the valuation under said laws for like taxation of the franchises of other corporations organized or chartered within and doing business within and without said State, and because otherwise said State would assume and does assume in effect to tax and assess real estate situated in and subject to taxation and actually taxed by other States and jurisdictions."

The plaintiff filed a replication to this answer; whereupon the cause was referred to Francis S. Fiske, Esq., "as Examiner, to take and report the evidence of both parties therein, and such questions of law arising thereon as either party shall desire." The Examiner's report was filed May 4, 1887, as follows:

"I, Francis S. Fiske, having been appointed by the Court a special examiner in the above-named case, report:

"That the information was filed in the Supreme Judicial Court of the State April 27, 1886, and removed to this court by the defendant; that the defendant is a telegraph company organized under the laws of the State of New York before the passage of the act of the Congress of the United States of July twenty-fourth, eighteen hundred and sixty-six, entitled 'An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes' (Rev. Stat., sec. 5263, *et seq.*), and is a corporation organized for purposes of
151 business and profit, having a capital stock divided into shares, which filed with the Postmaster-General of the United States its written acceptance of the restrictions and obligations required by law in accordance with said act on or about the twelfth day of June, 1867, and has ever since been in existence and operation.

"That on and before and since the first day of May, 1885, it has owned, controlled and used, under lease or otherwise, a line or lines of telegraph within said Commonwealth as part of a system of 146,052 and 60/100 miles of line extending throughout the United States, part of Canada, and to Cuba and England by submarine ocean cable, connecting with lines owned and established by the Government of the United States for public purposes.

"That on the sixteenth day of September, in said year 1885, after notice had been given to said Commonwealth of said filing and of other matters mentioned in the notice hereto appended, as below stated, and a return made by said company, under section 42 of chapter 13 of the Public Statutes of said Commonwealth, copies of which notice and return are appended (see pp. 536, 537, *supra*), the tax commissioner of said Commonwealth, in the manner required by its laws, estimated the fair cash valuation of all the shares constituting the capital stock of said corporation on said first day of May at $47,500,000, and allowed as credits to said corporation out of said $47,500,000 the sum or value of $8,786,076.

For 209¾ shares held by the company unissued, at $59.37½	$12,453.90
For stock in other companies outside of its system not included in above statement of miles of line..	8,773,622.70
	$8,786,076.60

152 "And determined the total number (or whole length) of the miles of line of said defendant to be 146,052.60 as aforesaid and 143,219.55 miles thereof, which included said cables, to be beyond the limits of said Commonwealth.

"That the rate determined under the fortieth section of said thirteenth chapter of said Public Statutes for the taxation of the corporate franchise therein mentioned was, in and for the year 1885, $14.14 each for each $1,000 of valuation.

"That said commissioner, being of opinion that the valuation of the corporate franchise of said defendant for taxation by said Commonwealth was to be ascertained by deducting

from said	$47,500,000.00
The said	8,786,076.00
Thus leaving	$38,713,924.00
And then taking as the total number of said line or lines	146,052.60
And as the number thereof in said Commonwealth..	2,833.05

without regard to the question whether any thereof were or were not on post roads, declared such by law, or navigable streams or waters of the United States, considered that the valuation of the corporate franchise of said defendant subject to be taxed in said Commonwealth at said rate was $\frac{2,833.05}{140,052.60}$ of said $38,713,924, or in all ($750,952) seven hundred and fifty thousand nine hundred and fifty-two dollars, and assessed a tax thereon of ($10,618.46) ten thousand six hundred and eighteen and 46/100 dollars to said company.

"That in fact more than 2,334.55 miles of said line within said Commonwealth, part of said 2,833.05 miles, were on, over, under, or across said post roads—that is to say, railroads or highways
153 made by law such post roads—or such streams or waters.

"That before and during said year and since said defendant has continually transmitted over said lines on said post roads, streams, or waters between the several departments of the United States government and their officers and agents or as provided by sec. 221 of the Revised Statutes of the United States, at rates fixed by the Postmaster-General, as required by said act of Congress or title LXV. of said section, telegraphic communications and messages for the government of the United States, including those for the signal service relating to the weather, storms, etc., and also commercial and business messages for purposes of foreign and interstate commerce from and to, into through, and over and between said State of Massachusetts and all the other States and Territories of the United States, the city of Washington, and the District of Columbia, and to and from

foreign countries by ocean submarine cables both for said government and for many private individuals and corporations resident and located as well out of as in said State.

"That it is impossible for said company to determine what portion of any sums received by it was received for services performed in said State in the transmission through the same or any part thereof of messages or communications received or delivered out of it or not on lines over said post roads, streams, or waters, but that the largest part, or approximately seventy per cent., of said sums was for messages received or delivered out of said State.

"That said defendant, on said first day of May, 1885, owned a large amount of real estate located and subject to local taxation out of said State of Massachusetts, on which there was assessed and paid
154 by it a large amount (over $48,000) of taxes, besides other taxes.

"That the amount or value of said real estate was not clearly shown, but it was shown that the cost of land and buildings thereon owned by the defendant and of buildings so owned on land not so owned out of said State was over $3,000,000; and it was agreed by the said parties that if it appeared and became material upon any final decision in this case to fix the amount or value of said real estate, or the taxes thereon, or the amount received for any class of messages, and it was not agreed upon by them, the same should be determined on further hearing by the examiner.

"That no deduction or allowance was made in assessing said tax or in ascertaining the valuation of said franchise for taxation as aforesaid on account of said real estate, land, or buildings, or the taxes paid thereon, or for anything not above specifically stated.

"That notice was duly given to said defendant of said tax, and demand made therefor as required by said chapter, but said defendant protested against said assessment and tax and declined to pay the same; whereupon this information was filed."

The cause was heard on these pleadings and upon the report of the Examiner, and the court on the 28th November, 1887, made a final decree therein:

"That the facts set forth in the examiner's report filed in this cause are true.

"That on those facts the method of valuation, assessment, and taxation provided by the laws of Massachusetts upon the franchise of the defendant corporation is not, as was claimed, and contended by said defendant, illegal and unconstitutional under the con-
155 stitution and laws either of the State of Massachusetts or of the United States—that is to say, either under the Constitution of the United States, Article I, section 8; Article III, section 2; Article VI; Amendments V and XIV; Revised Statutes of the United States, sections 5263, 5264, 5265, 5266, 5267, 5268, 5269, including a revision and consolidation of the act of July 24, 1866, chapter 230, accepted by the defendant before the revision of section 221; or under the constitution of said State, Part I, art. X; Part II, chapter I, section IV; or chapter 13 of its Public Statutes, but was and is in conformity with and authorized by said constitutions and laws, and that

therefore the sum claimed by the plaintiff to be due for taxes, to wit, $10,618.46, be paid to said State by said corporation, with interest thereon, and that an injunction shall be issued out of and under the seal of this court, directed to said corporation and its officers, agents, and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth as aforesaid for taxes as aforesaid shall have been fully paid, with interest and costs, unless the said sum is paid by said defendant as aforesaid within thirty days from the entry hereof."

From this decree the defendant appealed.

Mr. George S. Hale (with whom were Mr. Charles W. Wells and Mr. Willard Brown on the brief).

I. Telegraph companies, which have accepted the act of Congress, are, as to government business, government agencies, and so far as a state tax on a company is on, or affects, the means employed by the government of the United States to exercise its consti-
156 tutional powers, it is void. Western Union Telegraph Co. *v.* Texas, 105 U. S., 460; Osborn *v.* Bank of the United States, 9 Wheat. 738; Union Pacific Railroad *v.* Peniston, 18 Wall. 5; McCulloch *v.* Maryland, 4 Wheat. 316; Bank of Commerce *v.* New York, 2 Black, 620; Weston *v.* Charleston, 2 Pet. 449, Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1; Mayor *v.* Charleston, 36 Georgia, 460; Wabash, &c., Railway Co. *v.* Illinois, 118 U. S. 557; Fargo *v.* Michigan, 121 U. S. 230; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34; Manufacturers' Ins. Co. *v.* Loud, 99 Mass., 146; Hamilton Manufacturing Co. *v.* Massachusetts, 6 Wall. 632; Provident Institution *v.* Massachusetts, 6 Wall. 611; Portland Bank *v.* Apthorp, 12 Mass. 252; Commonwealth *v.* People's Five Cent Savings Bank, 5 Allen, 428; Bank of Augusta *v.* Earle, 13 Pet. 519; Attorney General *v.* Bay State Mining Co., 99 Mass. 148; Gleason *v.* McKay, 134 Mass., 419; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196; Philadelphia Steamship Co. *v.* Pennsylvania, 122 U. S. 326; People *v.* Weaver, 100 U. S. 539; Robbins *v.* Shelby County Taxing District, 120 U. S. 489.

II. The omission to deduct from the total valuation the real estate located and subject to local taxation in other States, renders the tax excessive and invalid. The Delaware Railroad Tax, 18 Wall. 206; Santa Clara County *v.* Southern Pacific Railroad, 118 U. S. 394; Libby *v.* Burnham, 15 Mass. 144; Stetson *v.* Kempton, 13 Mass. 272.

Mr. Andrew J. Waterman, Attorney General of the Commonwealth of Massachusetts, and Mr. Henry C. Bliss, Assistant Attorney General of that State cited: Portland Bank *v.* Apthorp, 12 Mass. 252; Commonwealth *v.* Savings Bank, 5 Allen, 428; Common-
157 wealth *v.* Hamilton Manuf. Co., 12 Allen, 298, 305, 309; Queen *v.* Arnaud, 9 Q. B. 806, 817; Utica *v.* Churchill, 33 N. Y. 161, 237; Van Allen *v.* Assessors, 3 Wall. 573; Attorney General *v.* Bay State Mining Co., 99 Mass. 148; Bank of Commerce *v.* New York, 2 Black, 620, 630; Delaware Railroad Tax Case, 18 Wall. 206, 225; State Tax on Railway Gross Receipts, 15 Wall. 284, 293;

Wabash, &c., Railroad *v.* Illinois, 118 U. S. 557, 594; Sherlock *v.* Alling, 93 U. S. 99; Munn *v.* Illinois, 94 U. S. 113; Chicago, Burlington, &c., Railroad *v.* Iowa, 94 U. S. 155; Paul *v.* Virginia, 8 Wall. 168; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 209; Railroad Co. *v.* Peniston, 18 Wall. 5, 34; Commonwealth *v.* Lancaster Savings Bank, 123 Mass. 493, 495; Woodruff *v.* Parhams, 8 Wall. 123; Manufacturers' Ins. Co. *v.* Loud, 99 Mass. 146; Oliver *v.* Washington Mills, 11 Allen, 268, 279; Hamilton Co. *v.* Massachusetts, 6 Wall. 632, 639; Dickey *v.* Turnpike Road Co., 7 Dana, 113; Thomson *v.* Pacific Railroad Company, 9 Wall. 579, 590; Fargo *v.* Michigan, 121 U. S. 230; Cooley *v.* Philadelphia, 12 How. 299; *Ex Parte* McNeil, 13 Wall. 236; Osborne *v.* Mobile, 16 Wall. 479, 481; McCulloch *v.* Maryland, 4 Wheat. 316, 429; Dwight *v.* Boston, 12 Allen, 316; S. C. 90 Am. Dec. 149; Railroad Company *v.* Fuller, 17 Wall. 560, 568.

Mr. Justice MILLER delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The action was commenced in the Supreme Judicial Court of Massachusetts, sitting in equity, by an information on behalf of the Commonwealth, by its Attorney General, at the relation of the Treasurer thereof, Alanson W. Beard. It was afterwards removed,
158 upon motion of the defendant, the Western Union Telegraph Company, into the Circuit Court of the United States. The object of the information was to enforce the collection of a tax levied by the proper authorities of the State upon the telegraph company, and to enjoin it from the further operation of its telegraph lines within the territorial limits of the Commonwealth until that tax was paid.

The defendant company is a corporation organized under the laws of the State of New York, having its capital stock divided into shares. The tax assessed by the treasurer of the Commonwealth of Massachusetts was based upon an estimate of $750,952 as the taxable value of the shares of the corporation apportioned to that State, the rate of taxation having been determined for that year, 1885, at $14.14 for and upon each $1,000 of valuation. The mode by which this taxable valuation was arrived at was this: The treasurer ascertained from the officers of the telegraph company that the valuation of its entire capital stock was $17,500,000, from which were deducted the credits proper to be allowed in determining the assessable value, leaving $38,713,924 as the total valuation of said stock liable to taxation. It was then ascertained that the total number of miles of line of said corporation in all the States and Territories of this country was 146,052.60, of which 143,219.55 were without the limits of the Commonwealth of Massachusetts, leaving 2,833.05 miles within its boundaries. Taking these figures the Treasurer of the State assessed the value of that portion of the capital stock of this company which, under this calculation, would fall within the Commonwealth of Massachusetts at the sum of $750,952. The amount thus arrived at, at the rate of $14.14 upon each $1,000 of valuation, produced the

sum of $10,618.46 as the amount of the tax claimed to be
159 due and payable to the treasurer of said Commonwealth by that corporation. This sum was demanded of the telegraph company, but it refused to pay the same.

The answer of the defendant corporation set up that of its 2,833.05 miles of line within the State of Massachusetts more than 2,334.55 miles were over, under, or across post-roads, made such by the United States, leaving only 498.50 miles not over or along such post-roads, on which the company offered to pay the proportion of the tax assessed according to mileage by the state authorities.

The main ground on which the telegraph company resisted the payment of the tax alleged to be due, and on which probably the case was removed from the state court into the Circuit Court of the United States, is that it is a violation of the rights conferred on the company by the act of July 24, 1866, now Title LXV, §§ 5263 to 5269 of the Revised Statutes. The defendant alleges that it had accepted the provisions of that law, and filed a notification of such acceptance with the Postmaster General of the United States, June 8, 1867. The argument is, therefore, that by virtue of sec. 5263 the company has a right to exercise its functions of telegraphing over so much of its lines as is connected with the military and post-roads of the United States which have been declared to be such by law without being subject to taxation therefor by the state authorities. That section reads as follows:

"SEC. 5263. Any telegraph company now organized, or which may hereafter be organized under the laws of any State, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the
160 United States which have been or may hereafter be declared such by law, and over, under, or across, the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads."

It is urged that this section, upon its acceptance by this corporation or any of like character, confers a right to do the business of telegraphing which is transacted over the lines so constructed over or along such post-roads, without liability to taxation by the State. The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statute above recited cannot be taxed by a State, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that Commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay

as a contribution to the support of its government upon the amount and value of the capital so employed by it therein.

The telegraph company, which is the defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the State of New York. It owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy, to the laws of the State under which it is organized. But the privilege of running the lines of its wires
161 "through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, * * * and over, under, or across the navigable streams or waters of the United States," is granted to it by the act of Congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal government, carries with it any exemption from the ordinary burdens of taxation.

While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support.

In the case of Telegraph Co. *v.* Texas, 105 U. S. 460, this question was very fully considered, and while a tax imposed upon every telegram passing over its lines, whether entirely within the State or coming from without its limits, or going from the State out of it, was held to be void so far as related to messages passing through more than one State, as an interference with or regulation
162 of commerce and with the act of Congress we have just been considering, it was distinctly pointed out that if it could be ascertained what telegrams were confined wholly within the State a tax on those might be imposed by it.

In that case the Chief Justice, delivering the opinion of the court, said:

"The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out

of the State, or sent by public officers on the business of the United States." pp. 464, 465.

This authority of the government gives to this telegraph company, as well as to all others of a similar character who accept its provisions, the right to run their lines over the roads and bridges which have been declared to be post-roads of the United States. If the principle now contended for be sound every railroad in the country should be exempt from taxation because they have all been declared to be post-roads and the same reasoning would apply with equal force to every bridge and navigable stream throughout the land. And if they were not exempt from the burden of taxation simply because they were post-roads, they would be so relieved whenever a telegraph company chose to make use of one of these roads or bridges along or over which to run its lines. It was to provide against the recognition of such a principle that this court, in the case above cited,
163 while holding that telegrams themselves coming from without a State or sent out of it as a part of their conveyance could not be taxed by the State specifically, nevertheless used the language that "its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business."

A still stronger case in the same direction is that of Railroad Company *v.* Peniston, 18 Wall. 5. The plaintiff in that action, the Union Pacific Railroad Company, was incorporated under a law of the United States. The State of Nebraska, under a revenue law passed by its legislature, undertook to lay a tax upon the property of that company which was used or embraced within the limits of its territory, upon a valuation of $16,000 per mile. The property thus rated and taxed consisted of its road beds, depots, stations, *telegraph poles, wires,* bridges, etc. It will be here observed that a part of the valuation on which this tax was levied was made up of the telegraph poles and wires belonging to the company.

The argument was pressed in that case that the railroad company held its franchises from the government of the United States, and that its property could not be taxed by the State, but this court held otherwise, and in the opinion used this language:

"It is often a difficult question whether a tax imposed by a State does in fact invade the domain of the general government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that
164 would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, co-existent with the national government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be ex-

tended so far as to destroy the necessary powers of the States, or prevent their efficient exercise" pp. 30, 31.

In the case of Thomson *v.* Pacific Railroad Co., 9 Wall. 579, is then cited, where it was held that the property of that company was not exempt from state taxation, though their railroad was a part of a system of roads constructed under the authority and direction of the United States, and largely for the uses and to serve the purposes of the general government. The court further said:

"A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops and munitions of war are carried upon almost every railroad. *Telegraph lines* are employed in the national service. So are steamboats, horses, stage coaches, foundries, ship yards and multitudes of manufcaturing establishments. They are the property of natural persons or of corporations, who are agents or instruments of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to
165 the revenue of the States it is manifest the state governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the Untied States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrased exercise of many of those powers, it has never been decided that state taxation of such property is impliedly prohibited." p. 33.

In National Bank *v.* Commonwealth, 9 Wall. 353, which was a case of a tax levied upon the shares of a national bank, the same objection in regard to a tax by state authority was pressed upon the court, but this court said that the principle of exemption of Federal agencies from state taxation has a limitation growing out of the necessity upon which the principle is founded. "That limitation is, that the agencies of the Federal government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the States. * * * So of the banks. They are subject to the laws of the State and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State law. Their acquisition and transfer of property, their right to collect their debts and their liability to be sued for debts are all based on State laws. It is only when the State law incapacitates the banks from discharging
166 their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal government authorized the tax." p. 362.

The tax in the present case, though nominally upon the shares of the capital stock of the company, is in fact a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by sec. 5263 of the Revised Statutes, or by the Commerce clause of the Constitution.

It is urged against this tax that in ascertaining the value of the stock no deduction is made on account of the value of real estate and machinery situated and subject to local taxation outside of the Commonwealth of Massachusetts. The report of Examiner Fiske to whom the matter was referred to find the facts, states that the amount of the value of said real estate outside of its jurisdiction was not clearly shown, but it did appear that the cost of land and buildings belonging to the company and entirely without that State was over three millions of dollars. In the statement of the treasurer of the company it is said that the value of real estate owned by the company within the State of Massachusetts was nothing. Since the corporation was only taxed for that proportion of its shares of capital stock which was supposed to be taxable in that State on the calculation above referred to, and since no real estate of the corporation was
167 owned or taxed within its limits, we do not see why any deduction should be made from the proportion of the capital stock which is taxed by its authorities. But if this were otherwise we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed and even in this case, which comes from the Circuit Court, and not from that of the State, we think it should appear that the corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this statute of Massachusetts is intended to govern the taxation of all corporations therein, and doing business within its territory, whether organized under its own laws or those of some other State, and since the principle is one which we cannot pronounce to be an unfair or an unjust one, we do not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result.

It is very clear to us when we consider the limited territorial extent of Massachusetts, and the proportion of the length of the lines of this company in that State to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not unfavorable to the corporation, so that the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily, or as a fair argument from the facts stated in the case, that there was injustice in the assessment for taxation.

168 The result of these views is that the tax assessed against the plaintiff in error is a valid tax; that the judgment of the court below, "That the sum claimed by the plaintiff (below) to be due for taxes, to wit, $10,618.46, be paid to said State by said corporation, with interest thereon," is without error, and so much of said judgment is hereby affirmed.

The decree or judgment, however, proceeds and awards an injunction against the company in the following language, added to that above extracted; "and that an injunction shall be issued out of and under the seal of this court, directed to said corporation and its officers, agents, and servants, commanding them, and each of them, absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth for taxes, as aforesaid, shall have been fully paid, with interest and costs, unless the said sum is paid by said defendant within thirty days from the entry hereof."

The effect of this injunction, if obeyed, is to utterly suspend the business of the telegraph company and defeat all its operations within the State of Massachusetts. The act of Congress says that the company accepting its provisions "shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States." It is found in this case that 2334.55 miles of the company's lines, out of 2833.05, on which this tax is assessed, are along and over such post-roads, and, of course, the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the State.

169 If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done. The injunction in this case, though ordered by a Circuit Court of the United States, is only granted by virtue of section 54 of chapter 13 of the Public Statutes of Massachusetts. If this statute is void, as we think it is, so far as it prescribes this injunction as a remedy to enforce the collection of its taxes by the decrees of the court awarding it, the injunction is erroneous.

In holding this portion of section 54 of chapter 13 of the Massachusetts statutes to be void as applicable to this case, we do not deprive the State of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment —executions, sequestration, and any other appropriate remedy in chancery.

That part of the decree of the Circuit Court which awards the injunction is, therefore, reversed, and the case is remanded to that court for further proceedings in conformity to this opinion.

Mr. Justice Bradley was not present at the argument of this case and took no part in its decision.

170 "EXHIBIT D" FOR IDENTIFICATION.

LAWS OF NEW JERSEY FOR THE TAXATION OF RAILROAD AND CANAL PROPERTY. GENERAL PUBLIC LAWS OF 1888, PAGES 269-287.

CHAPTER CCVIII.

"An Act to Revise and Amend 'An Act for the Taxation of Railroad and Canal Property,' Approved April Tenth, One Thousand Eight Hundred and Eighty-four.

1. *Be it enacted by the Senate and General Assembly of the State of New Jersey,* That all the property of any railroad or canal company not used for railroad or canal purposes shall be assessed and taxed by the same assessors and in the same manner and at the same rate as the taxable property of other owners in the same municipal division or taxing district; all other property of any railroad or canal company shall be assessed and taxed as hereinafter directed; the tax imposed by this act shall be in lieu of all other taxation upon the property subject to taxation under the provisions of this act; in all cases where the real estate, tangible personal property and franchise of any company are assessed and taxed under this act, the shares of stock and the bonds and certificates of indebtedness of such company shall not be taxed in the hands of the shareholders, bondholders or creditors, except as hereinafter provided.

2. (Amended by General Public Laws of 1891, Chapter 98, Page 165.)

3. *And be it enacted,* That it shall be the duty of the board of assessors to meet at Trenton on the first Tuesday of May in the present and each succeeding year and as often during each year and
171 at such places as their duties may require; they shall proceed to ascertain the true value of all property used for railroad or canal purposes of each railroad and of each canal company in this state, including its franchises, and they shall, in such ascertainment, ascertain:

I. The length and value of the main stem of each railroad, and of the water-way of each canal and the length of such main stem and water-way in each taxing district;

II. The value of the other real estate used for railroad or canal purposes in each taxing district in this state, including the road-bed (other than main stem), water-ways, reservoirs, tracks, buildings, water-tanks, water-works, riparian rights, docks, wharves and piers, and all other real estate, except lands not used for railroad or canal purposes;

III. The value of all the tangible personal property of each railroad and each canal company;

IV. The value of the remaining property, including the franchise.

The term 'main stem' of each railroad and of each canal company, as used in this act, shall be held to include the road-bed not exceeding

one hundred feet in width, with its rails and sleepers, depot buildings used for passengers connected therewith; the term 'water-way' shall be held to include the towing-path and berme-bank; the term 'taxing district' shall be held to designate any municipality, city, township, borough, incorporated town or village having power to assess and levy taxes, through which any road or canal may run; the term 'tangible personal property' shall be held to include the rolling-stock, cars, locomotives, ferryboats, all machinery, tools, other tangible per-
172 sonal property of any railroad company, and the floating, movable and other tangible personal property of any canal company, and also the locomotives and cars not belonging to such railroad company but built for its use and actually used in this state, or run under its control in this state by a sleeping-car company or other company; but the rolling stock of other persons or corporations temporarily used on any such road, and the floating or movable property temporarily used on such canal, but not forming part of the equipment of such road or canal, shall not be included in said term.

4. *And be it enacted,* That it shall be the duty of the assessors in all taxing districts where property of any railroad or canal company not used for railroad or canal purposes shall be assessed, if required so to do by the state board of assessors, to certify and send to the state board of assessors, on or before the second Monday of June in each year, a statement giving the description of such property and showing the assessed valuation thereof; the local assessors shall also, at the same time, certify and send to the state board of assessors a short description of all the real property in their respective taxing districts, used or owned for railroad or canal purposes, excepting the main stem or road-bed and track, not exceeding one hundred feet in width of each railroad, and the water-way, towing-path and berme-bank, not exceeding one hundred feet in width of each canal; the said assessors shall also certify to the said board the local rate of taxation for county and municipal purposes, as soon as the same shall be determined, and such other information obtained in the course of the performance of the duties of their office as the said board shall re-
173 quire of them, and for the service mentioned in this section the said local assessors shall receive three dollars per day for each day actually engaged in such service, to be paid on the warrant of the comptroller, on an affidavit of such service being filed in the office of said comptroller.

5. *And be it enacted,* That on the first Monday of July the board shall meet at the state house, in Trenton, and shall give a hearing to all companies interested, touching the valuation and assessment of their property; the board may adjourn from day to day, and may, if they see fit, require all arguments and communications to be presented in writing; when the first Monday of July shall fall on the fourth of fifth day of that month, the day of meeting shall be on the first Tuesday of July; all parties interested shall take notice of this hearing.

6. *And be it enacted,* That if the property of any railroad or canal company be leased to or operated by any other corporation, foreign

or domestic, the property of the lessor, or company whose property is operated, shall be subject to taxation in the manner hereinbefore directed, and if the lessee or operating company, being a foreign corporation, be the owner or possessor of any property in this state other than that which it derives from the lessor or company whose property is operated, it shall be assessed in respect of such property in like manner as any domestic railroad or canal company; any tangible personal property of such foreign company, if used or kept but a part of the time in this state, shall be assessed such proportionate part of its value as the time it is used or kept in this state during the calendar year preceding bears to the whole year.

7. *And be it enacted,* That in case any railroad or canal company shall claim any deduction on account of any mortgage or debt secured thereby, the said board are hereby required to allow the same in the cases in which and to the extent to which the assessor is authorized by law to allow a deduction in the case of any other owner of mortgaged lands, and thereupon the said mortgage and the estate of the mortgagee in the land mortgaged shall be subject to taxation in the same manner, as nearly as may be, and at the same rate or rates, as the estate of the mortgagor; the deduction shall be made *pro rata* from the valuation of each class of property covered by the mortgage, and the amount received from the taxation thereof shall be distributed as if the tax had been paid by the mortgagor without deduction.

8. *And be it enacted,* That if any railroad or canal company shall claim a deduction in any case in which such deduction could be claimed under the general laws of the state by other taxpayers for debts other than the deduction last hereinbefore mentioned, the said board are hereby required to allow the same and the said indebtedness so allowed shall be taxable as other debts owing to creditors residing in this state are taxable, and at the same rate; but the assessment thereof shall be made by said board and not by the local assessor, and the tax shall be paid to the treasurer of the state, to the credit of the fund derived from taxation under this act; the deduction shall be made *pro rata* from the valuation of each class of property of the debtor assessed, and shall be distributed as if the tax had been paid by the debtor without deduction; *provided,* that no deduction, either for mortgage or other indebtedness, shall be allowed unless the same shall be applied for in the report and statement required to be made pursuant to this act, and unless the nature of the indebtedness, and the name and residence of the creditor, and the different taxing districts in which the mortgaged land lies, shall be specified, and unless the other terms imposed by the general laws of the state upon other taxpayers claiming deduction shall be complied with.

9. *And be it enacted,* That the state board of assessors shall, upon the completion of their valuation and assessment, proceed to compute the tax upon the entire assessed valuation of each railroad company and of each canal company, as ascertained by them; upon such valuation, each company shall pay to the state, for general state purposes, a tax at the rate of one-half of one per centum an-

nually upon each dollar of valuation, and the state board of assessors shall compute the same; each company shall also pay, in addition to said tax of one-half of one per centum, a tax at the local rate as fixed and assessed for county and municipal purposes upon other property in each taxing district, upon the valuation of its property in the several taxing districts, separately valued and assessed under the provisions of subdivision two of section three of this act, which tax shall also be computed by the state board of assessors; but the last-mentioned rate shall in no case exceed one per centum of the valuation of the property valued under the provisions of subdivision two of section three of this act; the sum of the estimates or computations for each company shall constitute the tax to be paid by each company and shall be a lien paramount to all other liens upon all the lands and tangible property and franchise of such company in this state; such lien shall take effect on the first day of November, and a copy of the valuation in detail of the property of each cor-
176 poration and of the tax assessed against the same under the provisions of this act shall be served upon the treasurer of such corporation or left at his office within ten days after the said first day of November, but the failure to serve any such notice shall not be held to invalidate any tax assessed or affect any lien created under this act; said tax shall be a debt due from such company to the state on that date, for which an action at law or in equity may be maintained and which shall be a preferred debt in case of insolvency; these remedies are in addition to the special proceedings provided for in this act.

10. *And be it enacted*, That the said board shall certify and report to the comptroller of the state, on or before the first day of December in each year, a statement of the assessed valuation of the property of each company in the state, and of the separate valuation of property in each taxing district, as made by them, the amount of tax payable by such company with respect to its property separately valued in each taxing district, and the aggregate assessed valuation, and the total tax levied upon each company; such statement shall be made separately for each company, and as to said property separately valued, shall be arranged by taxing districts in such manner as to be of easy reference, and shall be recorded in books in the office of the state comptroller, to be provided by him for that purpose, and shall be public records, subject to public inspection; and the amount of tax payable by each company, as shown by the said statements, shall be due and payable into the state treasury, on any day between the first day of November and the first day of February following: and the payment or collection thereof shall not be stayed by any writ or order of any court of law or equity; it
177 shall be the duty of the state treasurer to receive payment of the said taxes from the said companies; if the taxes of any company, or any portion thereof, remain unpaid on the first day of February following the levying thereof, such company shall be considered in default, and such taxes, or such unpaid portion thereof, shall thenceforth bear interest at the rate of one per centum for each month until paid, notwithstanding the prosecution of any

writ of certiorari or other remedy; *provided,* that so much of the tax as is applicable to general state uses, as hereinafter provided, may be paid in four equal installments on or before the first day of February, May and August and the fifteenth day of October in each year, and any unpaid portion or installment shall bear interest only from the date limited for the payment thereof, at one per centum for each month until paid, but this privilege of payment by installments shall not be granted unless the portion of the tax which is applicable to county and local purposes shall be paid before the first day of February following the levying thereof.

11. (Amended by General Public Laws of 1888, Chapter 259, Pages 376, 377.)

12. *And be it enacted,* That the said state board of assessors shall meet on the third Monday of November, at the state house, in Trenton, for the purpose of reviewing their assessment, and may adjourn from time to time until they shall have finished the hearing; upon the written complaint of any company or person considering itself or himself aggrieved, and specifying their grievance, or of the attorney general or of any member of the board, on behalf of the state, that the property of any company is assessed too low, either in the whole or in any taxing district, or that property has been omitted, they shall review the said assessment, and
178 correct the same as shall appear just; the attorney general shall attend such meeting of said board in person or by deputy; no complaint that any company or person is assessed too low, or that any property has been omitted, shall be acted upon until the company or person so assessed shall be notified of such complaint by five days' notice, to be served on such company or person by leaving the same at the office of such company or at the usual place of abode of such person, if a resident of this state; the board shall have the power to issue subpœnas and examine witnesses and call for the production of books and papers, and they shall be entitled to use their personal knowledge and judgment as to the value of property; they shall certify to the comptroller of the state all corrections which they shall make in any assessment; the proceedings provided for by this section shall be completed before the fifteenth day of January following the making of said assessment, and all complaints must be presented on or before the third Monday of November, or shall be deemed to have been waived.

13. *And be it enacted,* That if any company or person assessed, or if the attorney general on behalf of the state, or if the authorities of any taxing district, shall desire to contest the validity or amount of any tax levied upon property under the provisions of this act, such contest shall be made by certiorari, which may be granted on notice to the attorney-general or to the company or person assessed, on a proper case made, on such terms as the justice or court granting the writ may impose; upon such writ, relief may be had as well in cases where it is claimed that the amount of tax is excessive or insufficient, as in cases where it is claimed that the principle
179 upon which the assessment is made is erroneous; *provided,* that no writ of certiorari shall be granted unless the appli-

cant has applied to said board of assessors to review the assessment, as provided for in this act, nor shall any writ of certiorari be granted after the expiration of three months from the final determination of said board; if such writ shall be allowed, and if it shall be made to appear that any assessment is unlawful, excessive or insufficient, the court shall correct the same by whomsoever such writ shall be prosecuted, and reduce or increase it, as may be just, or refer it back to the board of assessors, who shall correct or re-assess the same, in accordance with the instructions of the court; in any suit or proceeding, except on such certiorari, the certificate and report of the state board of assessors shall be conclusive and shall have the force and effect of a judgment of a court of record having competent jurisdiction, and the proceedings whereon such certificate and report are founded, shall not be inquired into; no assessment or tax shall be set aside for misnomer of the owner of the property assessed; but the name may be corrected at any time by the board of assessors or court; the prosecutor of a writ of certiorari shall pay eight cents per folio to the state board of assessors and comptroller for returns made by them of proceedings under this act.

14. *And be it enacted,* That if any tax under the provisions of this act shall remain unpaid in whole or in part for ten days after the expiration of the time limited for payment thereof, it shall be the duty of the attorney general to apply forthwith to a justice of the supreme court for an order that said tax and the interest due thereon and a reasonable sum to be certified by said justice to be paid for the expense of said proceeding, shall be made a record of the supreme court, and judgment shall be entered therefor in the name of the State of New Jersey as plaintiff against said company, mortgagee or mortgagees, or other creditor, as defendant, which order shall be made upon the production of a certified copy from the comptroller of the certificate and report of the state board of assessors on file in his office, and of the certificate of the comptroller that said tax has not been paid; the attorney general shall also apply for an order that execution forthwith issue on said judgment, directed to a master of the court of chancery, to be named by said justice in said order; the said orders shall be respectively applied for on five days' notice to the company or mortgagee or mortgagees or other creditor concerned, which notice, in case of any company, shall be served in the same manner as a summons is directed by law to be served upon a corporation, and in all cases the proceedings shall be summary; in case a certiorari shall have been granted, on application of the attorney-general the orders above provided for shall be made and enforced without prejudice to the right of the state to enforce the payment of any additional amount of tax which may be imposed and to apply for a second judgment therefor; in case a certiorari shall have been granted on application of any company or mortgagees or other creditor taxed, and the tax shall have been reduced after the payment thereof, then the excess shall be repaid by the state upon the order of the court, and the state comptroller shall, upon such order, issue his warrant for such payment accordingly.

15. *And be it enacted*, That the master in chancery to whom the execution shall be directed shall sell all the franchise, real estate and rolling stock and property of said company, and the
181 estate and interest of any mortgagees, and the debt due to any creditor for which a deduction has been allowed, or so much thereof as may be necessary to make the amount due on said tax judgment and the usual execution fees; the execution shall describe the property or debt aforesaid whereon the tax was assessed, and shall direct the sale thereof, and, generally, the sale of all other property of said company or person; such sale shall pass the absolute title to the franchise and property and debt aforesaid so sold, whereon the said tax was assessed or became a lien, free and clear of all liens, incumbrances and trusts of every nature, except taxes subsequently levied; in case of the sale of the estate and interest of any mortgagee it shall pass as well such estate as the interest of all bondholders and *cestuis que trust* for whose benefit said mortgage may have been given or may be held in trust or otherwise as to any other property of said company or persons, the judgment and execution shall constitute or become liens in the same manner and to the same extent as other judgments and executions of the supreme court; the sale, advertisements and proceedings under such executions shall be the same as under other executions of the supreme court; *provided, however*, that the company whose franchise, real estate, rolling stock and property, or any part thereof, has been so sold, and the mortgagee or mortgagees or any bondholder or other person having an interest in the estate and interest of the corporation or mortgagee which has been so sold, may, at any time within two years from and after any such sale, redeem the property so sold by tendering and paying to the purchaser or purchasers thereof the amount of the purchase-money by him or them paid, together with interest thereon at the rate of ten per centum per annum.

182 16. *And be it enacted*, That in order to ascertain the facts necessary for the discharge of their duties under this act, the said board shall use such lawful means as they may deem necessary; they may employ surveyors if they shall be dissatisfied with information otherwise attainable; they shall have the power of compelling the attendance of witnesses and the production of books and papers; and they may delegate such power to any member of their board authorized by them to investigate and report; they shall also use the returns hereinafter provided for, but such returns shall not be conclusive, and if any of said returns shall not be made, the board shall ascertain the necessary facts from the best information they can obtain, in such mode as they may find convenient, using their personal knowledge and judgment; the said assessors, or any one of them, shall have power to administer oaths and affirmations to any person to ascertain any facts which will enable them properly to perform the duties of their office, and they may reduce the statements of the person sworn to writing, and require him to swear and subscribe thereto, and may *ex parte*, apply for and obtain from any justice of the supreme court an order to compel any person to submit to examination in reference to such matters, and such justice

may punish any party as for a contempt who shall disobey any order made by such justice in the premises.

17. *And be it enacted*, That on or before the first Tuesday of May in each year, any person or company running, operating or constructing any railroad or canal in this state shall return to the state board of assessors statements or schedules, subscribed and sworn to by the president or other chief officer, before some officer
183 of the state authorized to administer oaths, of the property of such railroad or canal as it existed on the first day of January preceding, which, for each railroad, shall be as follows:

I. Of the real estate, specifying its extent and dimensions, which may be shown by a map or maps, setting out in detail the total length of the road, including branch and leased lines, the entire length in this state, and the length of double or side tracks; and the number, character and value of all buildings and structures in each county and in each taxing district through or in which it is located in this state, designating the main stem or road-bed and the width wherever it exceeds one hundred feet, and designating particularly any portion in each taxing district which is not used for railroad purposes, and which is locally assessed and taxed, and the value thereof;

II. Of the rolling stock and tangible personal property, giving the number of freight engines, passenger engines, passenger and freight cars, ferry boats and other movable property of every description, owned, used or hired, and the value thereof;

III. A statement or schedule, showing:

a. The amount of capital stock authorized and the number of shares into which such capital stock is divided:

b. The amount of capital stock paid up;

c. The market value, and if no market value, then the actual value of the shares of stock;

d. The total amount and the details and particulars of all indebtedness;

Such statements and schedules for canals shall be as follows:

I. Of all the real estate of said company, giving the depth
184 of water and dimensions of such canal, the length of the canal and of its feeders in the state, and the number, character and value of all locks, and of all buildings and other structures in each county and taxing district, designating particularly the width where it exceeds one hundred feet and designating any portion in each taxing district which is not used for canal purposes and which is locally assessed and taxed;

II. The floating and movable property;

III. A statement or schedule containing all the particulars above enumerated and to be returned by railroad companies in the third statement or schedule; such statements or schedules shall be made in conformity with such instructions and forms as may be prescribed by the said board, and such further statements shall be furnished as said board shall require; the said board shall prescribe the form of the oath to the statements and schedules required by

this section, any person who shall make such oath falsely shall be guilty of perjury.

18. *And be it enacted*, That any railroad or canal company claiming exemption from taxation under this act, by reason of any alleged contract with the state, shall, together with and in addition to the return required by the last section, make a further return specifying the act or acts of the legislature by which such contract is claimed to have been created, and also specifying what portion of the property of said railroad or canal company is claimed to be exempt from taxation under this act and the particulars thereof, and the cost and value thereof; and such other particulars as the charter of said company and as the said board may require, and the particulars as to character, location and value of the
185 property, if any, admitted to be liable under this act; such return shall be in no manner conclusive as to any of the facts therein stated, but said board shall investigate and determine whether any, and if any, what portion of the property of such company is by contract beyond the power of the state to tax under this act; and shall ascertain the cost and value thereof, and shall estimate the tax to be paid by such company; the residue of said property shall be assessed, apportioned, and valued and taxed pursuant to the provisions of this act.

19. *And be it enacted*, That it shall not be lawful for any railroad or canal company having any contract with the state whereby any of their property is exempted from the taxation imposed by this act, to acquire and hold, directly or indirectly, any property in this state (except such property as such company may be entitled to acquire and hold pursuant to their said contract with this state, if such company has any charter provisions on this subject which the legislature cannot abrogate or repeal), unless such company shall, by a written instrument, executed under their common seal, approved by the attorney general and filed with the secretary of state, first agree that any and all property acquired by such company after the passage of this act shall be subject to taxation under the provisions of this act, or any amendments thereto, or any further act of the legislature, in which case such property shall be so subject.

20. *And be it enacted*, That if any person or corporation running, operating or constructing any railroad or canal shall wilfully neglect to make returns, as required by this act, such person or corporation shall forfeit as a penalty not more than ten thousand dollars, to be assessed by the jury, for each offence, to be recovered in any
186 proper form of action in the supreme court, in the name of the state, and paid into the state treasury; it shall be the duty of said board to certify any such default to the attorney-general of the state, and it shall be the duty of the attorney-general to prosecute for such penalty; any person who shall make falsely any oath required to be made under this act, and any person who shall testify falsely when called to testify under this act, shall be guilty of perjury, and on conviction thereof shall be liable to all the penalties prescribed by law therefor.

21. *And be it enacted*, That all railroad companies in this

state, which shall hereafter pay any taxes imposed by this act on any cars, hired, leased, run or used on the roads of such companies in this state, shall have a right of action against the company or persons owning such cars, for the taxes so paid, with interest thereon from date of payment, and may sue for and recover the same in any court of competent jurisdiction; but nothing in this section shall be so construed as to avoid the obligation of any contract relating to the payment of taxes heretofore entered into or made between any such company, its agents, or person owning such cars, and any such railroad company.

22. *And be it enacted,* That if any company shall be in default under this act in payment of the state tax aforesaid, any person having any interest in a mortgage or other lien on its franchises or property, may pay the state treasurer the amount of such state tax, and the interest due thereon, and receive from said treasurer a certificate of such payment, and such person shall thereupon be entitled to be repaid the amount of said tax and interest thereon at
187 the rate of twelve per centum per annum out of the first proceeds of any sale of the franchises or said property of said company, and such tax and interest thereon shall continue a lien on the franchise and property of the company for the benefit of the holder of or person interested in such mortgage or lien until paid by said company from the sale of its franchises or property; if any proceedings have been taken by the attorney-general to enforce the payment of said tax and interest thereon, then such holder of or person interested in a mortgage or lien paying such tax and interest shall pay such additional amount as a justice of the supreme court shall certify to be proper and reasonable for the expenses and services of the proceedings as far as they have progressed for the collection of said tax and interest thereon.

23. *And be it enacted,* That if any railroad or canal shall be owned or operated under a franchise by any individual or association not incorporated, the term 'company' used in this act shall apply to such owners or operators, and such property shall be assessed and taxed under the provisions of this act in the same manner as if operated by a company, and the persons operating or owning such railroad or canal shall make the returns required by this act to be made by companies.

24. *And be it enacted,* That the Attorney-General shall, with the approval of the governor and comptroller, have power to employ such assistant attorneys or counsel as may be necessary to protect and properly defend the interest of the state, in carrying out the provisions of this act; and such assistants shall be paid such compensation by the state as may be approved by the attorney-general and the comptroller; the state board of assessors shall have the
188 power to employ such assistants in making their valuations as may be necessary to complete the same in due time, and such assistants shall be paid such reasonable compensation for their services as the board and the governor shall approve.

25. *And be it enacted,* That any corporation having or claiming to have any contract with the state whereby any of its property is

claimed to be exempted from the taxation imposed by this act, may, at its discretion, voluntarily pay to the state from year to year such sums of money as, added to the tax now assessable against such corporation under such alleged contract, will be equal to the tax assessable against such corporation under this act in respect to the property so claimed to be exempted, and such voluntary payment shall not be construed in any proceeding or suit to be a waiver by such corporation of its said alleged contract; *provided, however,* that nothing in this section, or in this act contained shall be construed or taken as an admission on the part of the state that any corporation is possessed of any contract or especial provision of the law on the subject of taxation which may not at any time be repealed or modified by the state.

26. *And be it enacted,* That if any section of this act shall, for any reason, be held to be unconstitutional or invalid, it shall not affect the other provisions of this act or any of them.

27. *And be it enacted,* That any corporation in this state having the right, by contract, to any different imposition of tax, either state or municipal, than that provided for in this act, are hereby authorized to execute and file in the office of the secretary of state an instrument, to be first approved by the attorney general, waiving the benefit of any such contract, whereupon they shall be
189 bound by the terms of this act, or any amendments hereto, or any further act of the legislature, and upon filing any such instrument the state agrees to surrender its right to take the property of any such corporation under any law now existing; *provided,* that any such corporation shall execute and file such instrument within six months from the time of the passage of this act.

28. *And be it enacted,* That in case any property of any railroad or canal company which has been or shall hereafter be in any year assessed by the local authorities of any taxing district has been or shall be also assessed by the state board of assessors as property used for railroad or canal purposes, the supreme court or any three justices thereof, to be assigned by the chief justice, shall determine, in a summary manner, the character of the property and whether used for railroad or canal purposes, and by which assessors the same has lawfully been assessed, which determination shall be made whether the taxes in question have been paid or not, and whether a certiorari to review either assessment has been granted or not; such determination shall be made under an order to show cause at a time and place to be therein designated, which order shall be granted by the chief justice of the supreme court upon application *ex parte* by any of the parties interested, namely, by the attorney general on behalf of the state, or by the owner of the property assessed, or by the authorities of the taxing district; and said order shall be served not less than ten days before the day fixed therein for the hearing, upon the said parties interested not making such application; depositions may be taken, on two days' notice by either party, to be used on such hearing; the justices before whom the matter shall be heard, may, if they see fit, view
190 the property in dispute, to guide them in their decision; the judgment of the court shall direct the cancellation or reduc-

tion of either assessment, as the character of the property may require, and shall make such order as to the return to the taxpayer of any tax or any portion thereof, that may have been paid to the state, or to any taxing district not entitled thereto, as such court shall deem just; the payment of costs may be directed in such manner as the court may deem equitable; the said judgment shall be conclusive and final in all collateral proceedings, but may be reviewed on writ of error by the court of errors and appeals.

29. *And be it enacted,* That if any corporation whose property and franchises have been or shall be valued and assessed under the provisions of the act to which this is a supplement, by the state board of assessors, shall pay or cause to be paid to the treasurer of the state the tax so assessed upon its property and its franchises at the times and in the same manner provided by law, or within fifteen days after the state board of assessors shall have made and declared their final revision of their valuations and assessments, that neither such payment nor the lapse of time in making application for a writ of certiorari shall be considered by any court or judge thereof as a reason why such corporation should not be entitled to such writ of certiorari upon any question adjudicated in favor of any corporation that may refuse to pay the taxes assessed against it, and that shall bring its writ of certiorari, to review the valuations and assessments within the time limited by the act to which this is a supplement; *provided,* application for writ of certiorari be made within six months after such question has been finally adjudicated,
191 and no other questions shall be considered on said writ.

30. *And be it enacted,* That this act shall be subject to amendments, alterations or repeal at the will of the legislature; the 'Act for the taxation of railroad and canal property,' approved April tenth, anno Domini eighteen hundred and eighty-four, which is by this act revised and amended, and the supplements thereto, approved February fifth and April fifth, anno Domini eighteen hundred and eighty-five, and all other acts inconsistent with the provisions of this act, are hereby repealed, except so far as herein re-enacted, but nothing in this repealer shall affect or impair the lien of any taxes heretofore assessed or any remedies for the collection of the same, or to surrender any remedies, powers, rights or privileges acquired by the state under said act hereby revised, or to relieve any person or corporation from any penalty imposed by said act and supplements, nor shall anything in this act be held to repeal the supplement to the said act hereby revised, which supplement was approved June tenth anno Domini eighteen hundred and eighty-six, nor shall this act affect the tenure of office of the present state board of assessors.

31. *And be it enacted,* That this act shall take effect immediately."

Approved March 27, 1888.

192 "EXHIBIT D" FOR IDENTIFICATION (Cont'd).

LAWS OF NEW JERSEY FOR THE TAXATION OF RAILROAD AND CANAL PROPERTY.

GENERAL PUBLIC LAWS OF 1888, PAGES 376, 377. CHAPTER CCLIX.

An Act to amend an act entitled "An act to revise and amend 'An act for the (taxation) of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four," which was approved March twenty-seventh, one thousand eight hundred and eighty-eight.

1. *Be it Enacted by the Senate and General Assembly of the State of New Jersey,* That the eleventh section of an act to revise and amend an act entitled 'An act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four, be and the same is hereby amended so as to read as follows:

2. *And be it enacted,* That the money collected under this act for the one-half of one per centum tax shall be applied to the uses of the State, according to law; the amount received for tax upon property separately assessed in the different taxing districts is hereby appropriated, and shall be allotted to the various taxing districts, giving to each district the amounts that was derived from the property of each railroad or canal company therein; the comptroller shall transmit to the collector of each county a certificate showing the amount allotted to the taxing districts therein, and shall draw his warrant upon the state treasury, in favor of the several county collectors, for the amounts allotted to their several counties, and the county collector shall forthwith pay to the collector, or other proper
193 officer of each taxing district, the amount allotted thereto, deducting, however, the amount due for county taxes from such taxing district; the amount thus paid to the county and taxing district shall be at the disposal of the proper authorities for public purposes; *provided, however,* that whenever the local city rate as fixed and assessed in any city exceeds one per centum of the ratables of such city, then in such case the comptroller shall transmit to the collector of taxes of said city a certificate showing the amount allotted to such city, and shall draw his warrant upon the state treasury in favor of the treasurer of such city for said amount; such warrant to be at the disposal of the board of such city having control of its finances, to be used for the municipal purposes of such city, such amount to be first applied to the purchase of such outstanding bonds or obligations of the city as can be bought below the par value thereof, and if no bonds or obligations can be bought below par, then such amount, or the balance, if any, shall be applied to the payment of such part of the city debt and interest falling due thereon as the said board having control of the finances of the city may determine.

2. *And be it enacted,* That this act shall take effect immediately.

Approved April 2, 1888.

15—587

194 "EXHIBIT D" FOR IDENTIFICATION (Cont'd).

LAWS OF NEW JERSEY FOR THE TAXATION OF RAILROAD AND CANAL PROPERTY.

GENERAL PUBLIC LAWS OF 1891, PAGES 165, 166. CHAPTER XCVIII.

A supplement to an act entitled "An act to revise and amend 'An act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four," approved March twenty-seventh, one thousand eight hundred and eighty-eight.

1. *Be it enacted by the Senate and General Assembly of the State of New Jersey,* That section two of the act to which this is a supplement, be amended to read as follows:

2. *And be it enacted,* That all property of any railroad and of any canal company used for railroad or canal purposes shall be assessed by a state board of assessors, which shall consist of four members, and shall be appointed by the governor, by and with the advice and consent of the senate; no person shall be qualified or authorized to act as a member of said board unless his appointment shall have been confirmed by the senate; their term of office shall commence on the first Monday of May; the assessors first appointed shall be appointed to hold office respectively for one, two, three and four years, and until the appointment of a successor; all subsequent appointments shall be for a term of four years and until the appointment of a successor; vacancies shall be filled by the governor, subject to the approval of the senate; the said assessors shall be citizens of this state, and shall not, during their term of office, be interested in any
195 railroad or canal company; each assessor shall, before entering upon his duties, file with the secretary of state an oath taken before a justice of the supreme court that he will faithfully discharge the duties of his office, and that he is not interested in any railroad or canal company; they shall each receive an annual salary of twenty-five hundred dollars; three members shall constitute a quorum, and any official act shall be valid which has the sanction of three members; they may employ a secretary, who shall receive an annual compensation as the board of assessors may determine, not to exceed twenty-five hundred dollars; they shall keep a record of their proceedings and shall annually report to the legislature.

2. *And be it enacted,* That this act shall take effect immediately.

Approved March 17, 1891.

196 EXHIBIT "E" FOR IDENTIFICATION.

LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, SESSION OF 1889.

(p. 420.) No. 332.

A further supplement to an act entitled "An act to provide revenue by taxation," approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine.

* * * * * * *

(p. 427.) SECTION 19. That hereafter no limited partnership, bank, joint-stock association, association, corporation or company whatsoever, formed, erected, incorporated or oganized by or under any law of this commonwealth, general or special, or formed, erected, incorporated or organized under the laws of any other state, and doing business in this commonwealth, shall go into operation, without first having the name of the institution or company, the date of incorporation or organization, the act of assembly or authority under which formed, incorporated or organized, the place of business, the post office address, the names of the president, chairman, secretary and treasurer or cashier, and the amount of capital authorized by its charter, and the amount of capital paid into the treasury, registered in the office of the auditor general; and every limited partnership, bank, association, joint-stock association, company or corporation whatsoever, now engaged in business in this comonwealth, shall within ninety days after the passage of this act, register as herein required in the office of the auditor general; all the corporations, companies, associations and limited partnerships
197 aforesaid, shall annually hereafter notify the auditor general of any change in their officers; and any such institution or company which shall neglect or refuse to comply with the provisions of this section, shall be subject to a penalty of five hundred dollars, which penalty shall be collected on an account settled by the auditor general and state treasurer in the same manner as taxes on capital stock are settled and collected.

SESSION OF 1891.

(p. 229.) No. 200.

An act to provide increased revenues for the purposes of relieving the burdens of local taxation, being supplementary to an act entitled "An Act to provide revenue by taxation," approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine, amending the first, fourteenth, sixteenth, twentieth, twenty-first, twenty-fifth and twenty-sixth sections of an act supplementary thereto, which became a law on the first day of June, Anno Domini one thousand eight hundred and eighty-nine, entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine," and providing for greater uniformity of taxation by taxing all of the property of corporations, limited partnerships and joint-stock associations having a capital stock, at the rate of five mills on each dollar of its actual value.

* * * * * * *

(p. 233.) SECTION 4. That section twenty of said act which reads as follows, to-wit,

* * * * * * *

(p. 235.) be and the same is hereby amended so as to read as follows:

SECTION 20. That hereafter, except in the case of banks, 198 savings institutions and foreign insurance companies, it shall be the duty of the president, chairman or treasurer of every corporation, having capital stock, every joint-stock association and limited partnership whatsover, now or hereafter organized or incorporated by or under any law of this Commonwealth, and of every corporation, joint-stock association and limited partnership whatsoever, now or hereafter incorporated or organized by or under the laws of any other state or territory of the United States, or by the United States or by any foreign government, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth by or in the name of any limited partnership, joint-stock association, company or corporation whatsoever, association or associations, co-partnership or co-partnerships, person or persons, or in any other manner, to make a report in writing to the Auditor General, in the month of November, one thousand eight hundred and ninety-two, and annually thereafter, stating specifically:

First. Total authorized capital stock.
Second. Total authorized number of shares.
Third. Number of shares of stock issued.
Fourth. Par value of each share.
Fifth. Amount paid into the treasury on each share.
Sixth. Amount of capital paid in.

Seventh. Amount of capital on which dividend was declared.

Eighth. Date of each dividend declared during said year ended with the first Monday of November.

Ninth. Rate per centum of each dividend declared.

199 Tenth. Amount of each dividend during the year ended with the first Monday in said month.

Eleventh. Gross earnings during the year.

Twelfth. Net earnings during said year.

Thirteenth. Amount of surplus.

Fourteenth. Amount of profit added to sinking fund during said year.

Fifteenth. Highest price of sales of stock between the first and fifteenth days of November aforesaid.

Sixteenth. Highest price of sales of stock during the year aforesaid.

Seventeenth. Average price of sales of stock during the year; and in every case any two of the following officers of such corporation, limited partnership or joint-stock association, namely: The president, chairman, secretary and treasurer, after being duly sworn or affirmed to do and perform the same with fidelity and according to the best of their knowledge and belief, shall, between the first and fifteenth days of November of each year, estimate and appraise the capital stock of the said company at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated, or measured by net earnings or by the amount of profit made and either declared in dividends, or carried into surplus or sinking fund, and when the same shall have been so truly estimated and appraised they shall forthwith forward to the Auditor General a certificate thereof, accompanied with a copy of their said oath or affirmation, signed by them and attested by a magistrate or other person duly qualified to administer the same: Provided, That if the Auditor General and State Treasurer, or either of them, is not satisfied with the appraise-

200 ment and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, based upon the facts contained in the report herein required, or upon any information within their possession, or that shall come into their possession, and to settle an account on the valuation so made by them for the taxes, penalties and interest due the Commonwealth thereon, with right to the company dissatisfied with any settlement so made against it to appeal therefrom in the manner now provided by law; and in the event of the neglect or refusal of the officers of any corporation, company, joint-stock association or limited partnership, for a period of sixty days, to make the report and appraisement to the Auditor General as herein provided, it shall be the duty of the Auditor General and State Treasurer to estimate a valuation of the capital stock of such defaulting corporation, company, joint-stock association or limited partnership, and settle an account for taxes, penalty and interest thereon, from which settlement there shall be no right of appeal."

"EXHIBIT E" FOR IDENTIFICATION (Cont'd).

SESSION OF 1893.

(p. 353.) No. 288.

An act being a further supplement to an act entitled "An act to provide revenue by taxation," approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine, amending the amendment of the supplement thereto, which became a law on the first day of June, Anno Domini one
201 thousand eight hundred and eighty-nine, which amendment herein amended was approved the eighth day of June, Anno Domini one thousand eight hundred and ninety-one, relating to the tax on capital stock.

SECTION 1. Be it enacted, &c., that the twenty-first section of an act which became a law on the first day of June, Anno Domini one thousand eight hundred and eighty-nine, entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine, as the said section is amended by an act approved the eight- day of June, Anno Domini one thousand eight hundred and ninety-one," which reads as follows, to-wit:

* * * * * * *

be and the same is hereby amended so as to read as follows:

SECTION 21. That every corporation, joint-stock association, limited partnership and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to and pay into the treasury of the Commonwealth, annually, a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, including common, special and preferred, as ascertained in the manner prescribed in the said twentieth section, and it shall be the duty of the treasurer or other officers having charge of any such corporation, joint-stock association or limited partnership, upon which a tax is imposed by this section, to transmit the amount of said tax to the treasury of the Commonwealth within thirty days from the date of settlement of the account by the Auditor General and State Treasurer; *Provided*, That for the purposes of this act, interests in limited partnerships or joint-
202 stock associations shall be deemed to be capital stock and taxable accordingly; *Provided, also*, That corporations, limited partnerships and joint-stock associations, liable to tax on capital stock under this section, shall not be required to make and report or pay any further tax on the mortgages, bonds and other securities owned by them in their own right; but corporations, limited partnerships and joint-stock associations holding such securities as trustees, executors, administrators, guardians, or in any other manner, shall return and pay the tax imposed by this act upon all securities so held by them as in the case of individuals: *And provided further,*

That the provisions of this section shall not apply to the taxation of so much of the capital stock of corporations, limited partnerships or joint-stock associations, organized for manufacturing purposes, which is invested in and actually and exclusively employed in carrying on manufacturing within the State, except companies engaged in the brewing or distilling of spirits or malt liquors and such as enjoy and exercise the right of eminent domain; but every manufacturing corporation, limited partnership or joint-stock association shall pay the State tax of five mills herein provided, upon such proportion of its capital stock, if any, as may be invested in any property or business not strictly incident or appurtenant to its manufacturing business, in addition to the local taxes assessed upon its property in the districts where located, it being the object of this proviso to relieve from State taxation only so much of the capital stock as is invested purely in the manufacturing plant and business: *Provided further,* In case of fire or marine insurance companies the tax imposed by this section shall be at the rate of three mills on each dollar of the actual value of the whole capital stock.

Approved June 8, 1893.

203 "EXHIBIT E" FOR IDENTIFICATION (Cont'd).

SESSION OF 1889.

No. 332.

(p. 431.) "SECTION 23. That every railroad company, pipe line company, conduit company, steamboat company, canal company, slack water navigation company, transportation company, street passenger railway company, and every other company, joint-stock association or limited partnership, now or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereafter organized or incorporated by any other State or by the United States or any foreign government, and doing business in this Commonwealth, and owning, operating or leasing to or from another corporation, company, association, joint stock association or limited partnership, any railroad, pipe line. slack water navigation, street passenger railway, canal or other device for the transportation of freight or passengers or oil, and every telephone or telegraph company incorporated under the laws of this or any other State or of the United States and doing business in this Commonwealth, and every express company, incorporated or unincorporated, doing business in this Commonwealth, and every firm, co-partnership or joint-stock company or association doing express business in this Commonwealth, and every electric light company, and every palace car and sleeping car company, incorporated or unincorporated, doing business in this Commonwealth, shall pay to the state treasurer a tax of eight mills upon the dollar upon the gross receipts of said corporation, company or association, limited partnership, firm or co-partnership, received from passengers and freight traffic transported wholly within this

State, and from telegraph, telephone or express business
204 done wholly within this State, or from business of electric light companies, and from the transportation of oil done wholly within the State; the said tax shall be paid semi-annually upon the last days of January and July in each year; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of the said company, firm, co-partnership, limited partnership, joint-stock association or corporation, to transmit to the auditor general a statement, under oath or affirmation, of the amount of gross receipts of the said companies, co-partnerships, corporations, joint-stock associations or limited partnerships derived from all sources, and of gross receipts from business done wholly within the State, during the preceding six months ending on the first days of January and July in each year; and if any such company, firm, co-partnership, joint-stock association, association or limited partnership or corporation, shall neglect or refuse for a period of thirty days after such tax becomes due, to make said returns or to pay the same, the amount thereof with an addition of ten per centum thereto, shall be collected for the use of the Commonwealth as other taxes are recoverable by law; *Provided*, That in any case where the works of one corporation, company, joint-stock association or limited partnership are leased to and operated by another corporation, company, association or limited partnership, the taxes imposed by this section shall be apportioned between the said corporations, companies, associations or limited partnerships, in accordance with the terms of their respective leases or agreements, but for the payment of the said taxes, the Commonwealth shall first look to the corporation, company, association or limited part-
205 nership operating the works, and upon payment by the said company, corporation, association or limited partnership of a tax upon the receipts as herein provided derived from the operation thereof, the corporation, company, joint-stock association or limited partnership from which the said works are leased, shall not be held liable under this section for any tax upon the proportion of said receipts received by it as rental from the use of said works.

SESSION OF 1889.

No. 332.

(p. 437.) SECTION 31. That all taxes imposed by this act shall be a lien upon the franchises and property, both real and personal, of corporations, companies, associations, joint-stock associations and limited partnerships, from the time the said taxes are due and payable; and whenever the franchises or property of a corporation, company, association, joint-stock association or limited partnership shall be sold at a judicial sale, all taxes due the Commonwealth shall first be allowed and paid out of the proceeds of such sale, before any judgment, mortgage or other claims which shall be entered of record or become a lien after the passage of this act.

206 "EXHIBIT F" FOR IDENTIFICATION.

PENNSYLVANIA COUNTY COURT REPORTS, VOLUME 14, PAGE 440.

COMMONWEALTH
vs.
DELAWARE, SUSQUEHANNA & SCHUYLKILL RAILROAD COMPANY.

Corporations—taxation of capital stock—minimum value—actual value—tangible property and assets—franchises and privileges—material results realized therefrom—section 4, revenue act of 1891, P. L., 229—preamble of act of 1891.

The intent and meaning of Sec. 4 of the revenue act of 1891 is that only so much of the income of a corporation—using this word as an equivalent for both net earnings and amount of profit made—as is "made and either declared in dividends or carried into surplus or sinking fund" is to be taken as the test of minimum value in appraising the capital stock of a corporation: Commonwealth *vs.* Sharon Coal Co., 14 Pa. C. C. R., 222.

The amount and rate per cent. of dividends made and the amount carried into surplus or sinking fund during the tax year do not furnish an absolute indication or measure of the actual value in cash of the capital stock, but are to be considered with all other relevant facts in determining what is its actual value in cash: Commonwealth *vs.* Sharon Coal Co., 14 Pa. C. C. R., 222; Commonwealth *vs.* Edgerton Coal Co., 14 Pa. C. C. R.

The tax on capital stock imposed by the taxing acts of Pennsylvania is not a franchise or license tax, but is a tax on the property and assets of a corporation: Commonwealth *vs.* Standard Oil Co., 101 Pa., 119.

207 The capital stock represents not only the property and assets of a corporation, but also the value of its franchises and privileges and facilities for doing business and the success with which the business is actually carried on, so far as these are denoted and expressed by the pecuniary results realized; these elements of value are intended to be reached by the tax on capital stock by the express terms of the act of 1891.

Tax on capital stock.

C. P. Dauphin Co. March Term, 1893. No. 302.

Hensel, Attorney-General for the Commonwealth, and Lamberton, for the defendant.

SIMONTON, *P. J.:*

This is an appeal by the corporation defendant from the settlement of an account against it by the auditor general and state treasurer of tax on capital stock for the year ending first Monday of November, 1892, and it was tried by the court without a jury under the act of April 22, 1874.

Findings of Fact.

1. Defendant is and was during the year 1892 a corporation of and doing business in the State of Pennsylvania chartered in April, 1890, with an authorized capital stock of $1,000,000, of which $400,000 was paid in prior to June, 1892, and the balance at that time. Its railroad is located in the anthracite coal region of eastern Pennsylvania, and including branches is about 60 miles in length. It runs in a devious course, and thus and by means of branches from the main line reaches a number of collieries, nearly all of which are owned and controlled by the firm of Coxe Brothers & Co., who also own nearly all the shares of stock in the railroad company;
208 it was built for the purpose of connecting these collieries with the various railroads that traverse that region, and does not connect with the Pennsylvania, the Reading, the Lehigh Valley and the Jersey Central railroads; thus giving the owners of these collieries and of this railroad not merely access to the various markets for coal, east, north and west, but also a choice of roads over which to reach these markets and with which to make traffic contracts. Nearly all of the freight carried by the defendant is coal, and should this traffic fail or be withdrawn its capital stock would be comparatively valueless; but there is no evidence in the case tending to show that there is any present prospect that this will occur; and in view of the fact that these railroads and these collieries are owned by the same persons, it does not seem probable, so long as the coal mines are not exhausted; nor is there any evidence that this will take place for many years to come.

2. The gross earnings of the defendant during the year 1892 were $739,914.15 and its net earnings were $523,243.15, and it made one dividend during the year, on October 15th, 1892, of 40%, amounting to $400,000, out of net earnings realized to June 30, 1892; its net earnings from June 30, 1892, to February 28, 1893, were about $450,000, and the amount of its surplus on the first Monday in November, 1892, was $242,142.89, in addition to book accounts amounting to about $100,000 in excess of its current indebtedness; and there is no evidence in the case tending to show that its net earnings will be less in the future, except in so far as they may be affected by the general financial depression. The total cost of defendant's railroad, which was completed in February, 1893, including equipment, was $1,159,323.70.

3. Defendant's president and treasurer made to the auditor
209 general, under the sanction of the prescribed oath, the report and appraisement required by sec. 4 of the act of 1891 (P. L. 229), appraising defendant's capital stock of $2,000,000, which is double its par value. There were no sales of shares of the stock during the tax year.

4. The auditor general and the state treasurer were not satisfied with and did not accept this appraisement; but, as they understood to be their duty under the law, made an appraisement and fixed the value of said capital stock at $8,720,719.16. In making this appraisement they had before them no other evidence of its actual value

than that contained in the report made by the officers of the corporation as above stated; and this amount was adopted by them as the value of the capital stock because it was the sum which at six per cent. would produce $523,234.15, the amount of net earnings made by the defendant as shown by said report. On this valuation so made by the auditor general and state treasurer an account was settled against defendant for tax at the rate of 5 mills, amounting to $43,603.59, from which settlement defendant duly appealed to this court.

5. We find from the evidence that the actual value of the defendant's capital stock between the first and 15th days of November, 1892, was not $8,720,719.16, the amount at which it was appraised by the auditor general and state treasurer; but having in view from the evidence, considering all the facts which are in our judgment relevant on the principles more fully explained below, we find that the actual value in cash of the defendant's capital stock at the date mentioned was $4,000,000.

We have decided in opinions recently filed in Com. *v.* Sharon Coal Co., 23, June Term, 1893 (14 Pa. C. C. R., 222), in Com. *v.*
210 Edgerton Coal Co., 21, June Term, 1893, that the intent and meaning of sec. 4 of the revenue act of 1891, P. L. 229, is that only so much of the income of a corporation—using this word as an equivalent for both net earnings and amount of profit made—as is "made and either declared in dividends or carried into surplus or sinking fund" is to be taken as the test of minimum value in appraising the capital stock of a corporation; and that the amount and rate per cent. of the dividends made and the amount carried into surplus or sinking fund during the tax year do not furnish an absolute indication or measure of the actual value in cash of the capital stock, but are to be considered with all other relevant facts in determining what is its actual value in cash.

These decisions settle for us the law of this case on the points thus described and lead to the result that the appraisement made by the auditor general and state treasurer and the settlement based thereon cannot be sustained merely as a conclusion of law, but must stand or fall on the actual facts of the case; in other words, the question we have to decide on this appeal is what is the actual value in cash of the defendant's capital stock.

It has been settled by numerous decisions which are cited and affirmed in Com. *vs.* Standard Oil Co., 101 Pa., 119, that the tax on capital stock imposed by the taxing acts of this state is not a franchise or license tax, but is a tax on the property and assets of a corporation. But it by no means follows that the capital stock and the tangible property and assets are identical either in substance or in value. The capital stock, it is true, represents the property and assets of the corporation, but it represents also the value of its franchises and privileges and facilities for doing business and the success with
which the business is actually carried on, so far as these are
211 denoted and expressed by the pecuniary results realized; and the tax on capital stock is by the express terms of the act of 1891 intended to reach these elements of value. See preamble 6 P. L., 1891, p. 229.

The case of Com. *v.* Hamilton Manufacturing Co., 12 Allen, 298, contains an admirable discussion and exposition by Bigelow, *C. J.*, of the difference which may exist between the value of the tangible property and the assets of a corporation and the value of its capital stock, which is so apt for our purpose that we make copious extracts therefrom, with the remark that the whole opinion ought to be read in its connection. Assuming that the value of the capital stock of a corporation is equal to the value of all its shares—the theory of the act of 1891, which makes the market price of the shares a test of the actual value of the capital stock—he says: "The aggregate market value of all shares, by which we understand the cash price for which the shares will sell in the market, does not necessarily indicate the actual value or amount of property which a corporation may own. The price for which all the shares would sell may greatly exceed the aggregate of the corporate property or it may fall very short of it. Undoubtedly the amount of property belonging to a corporation is one of the considerations which enters into the market value of its shares; but such market value also embraces other essential elements. It is not made up solely by the valuation or estimate which may be put on the corporate property, but it also includes the profits and gains which have attended its operations, the prospects of its future success, the nature and extent of its corporate rights and privileges and the skill and ability with which its business is managed. In other words, it is the estimate put on the potentiality of a cor-
212 poration, on the capacity to avail itself profitably of its franchise, and on the modes in which it uses its privileges as a corporate body, which materially influences and often controls the market value." "There may be two corporations organized with similar powers, having the same number of shares, the same amount of property, of capital, and both may be engaged in the same branch of business; the market value of the shares in one corporation may be double that of the other, because one is prosperous and likely to make large gains, while the other is unsuccessful and is carrying on a business which may prove unprofitable or lead to heavy loss. The tax is therefore laid not on capital stock as signifying the money paid in to carry on the business of the corporation or the property purchased and owned by the corporation, but on the capital stock representing the aggregate of the market value of the shares. The price for which these shares may be sold does not depend upon the value or amount of property belonging to a corporation, but rather on the capacity of a corporation to use its property in connection with its corporate powers and privileges advantageously and profitably and upon the present prosperity, prospective earnings and profitable final results of the corporate business." "Nor are we able to see any reason why the aggregate market value of all the shares of a corporation, representing as it does the estimate put not merely on the property of a corporation but also on the rights, privileges, capacities and present and prospective results of the corporate organization and business—in other words, on its franchise—is not a legitimate and just method of arriving at a basis on which to calculate an excise or tax."

These extracts, and still more the whole opinion from which they are taken, abundantly show that the actual value in cash of
213 defendant's capital stock is not to be determined solely by ascertaining the value of its tangible property and assets, but that many other elements of value are to be considered. Chief Justice Bigelow's discussion, it is true, leads him to the conclusion that the tax he is considering is a franchise tax, and not a tax on tangible property; but this view of the case was considered in the Supreme Court of the United States in Hamilton Co. *v.* Massachusetts, 6 Wall. 632, was accepted only because it was thought to be required by the peculiar provision of the constitution of the state of Massachusetts, and the construction which had long been put upon it by the Supreme Court of that State, which as a question of the construction of a state statute was binding on the federal court. Thus Mr. Justice Clifford, delivering the opinion and referring to the decision that the tax in question was a franchise tax, at page 639 said: "Separate from the peculiar provision of the state constitution and the long practice under the original decision" (in Portland Bank *v.* Apthorp, 12 Mass. 252) "the present decision of the state court upon the subject might well be criticised as founded in unsubstantial distinctions, but when weighed as an exposition of that peculiar clause" (of the state constitution) "and in view of the long practice of the state, commencing long before the prior decision was made, it is not possible to withhold from the conclusion a full and unqualified concurrence * * * fifty years have elapsed since that decision was made and the practice in substance and effect is still continued, having been repeatedly sanctioned by the unanimous decisions of the highest judicial authority of the state."

The Chief Justice and Justices Greer and Miller refused to be bound by the construction put upon the statute by the state court and dissented on the ground that the tax in question was a
214 tax on the property of the corporation and not a franchise tax.

On the subject of taxing corporate franchises as property Justice Clifford said: "Corporate franchises * * * are legal estates and not mere naked powers granted to the corporations, but powers coupled with an interest which rest in the corporation by virtue of their charter, and * * * the privileges and franchises of a private corporation unless exempt in terms which amount to a contract, are as much the legitimate subjects of taxation as any other property of the citizens within the sovereign power of the state."

And in Wilmington Railroad *v.* Reid, 13 Wall. 264, Mr. Justice Davis, delivering the opinion of the court, said: "It is insisted, however, that the tax on the franchise is something entirely distinct from the property of the corporation, and that the legislature was not therefore inhibited from taxing it. Nothing is better settled than that the franchise of a private corporation * * * which in its application to a railroad is the privilege of running it and taking fares and freight * * * is property, and of the most valuable kind, as it cannot be taken for public use even without compensation. It is true it is not the same sort of property as the rolling stock, roadbed

and depot grounds, but it is equally with them covered by the general term 'the property of the company.'"

There is therefore no legal principle in the way of holding that the tax on capital stock in this state is a tax on property and at the same time including in the appraisement the value of the franchises and privileges enjoyed and exercised by the corporation, and determining the value of these by the material result of their exercise.

Acting on the principle suggested by the foregoing dis-
215 cussion the members of this court, both of whom sat at the trial, concur in the findings of fact above set forth, and in the conclusion that the defendant's capital stock was between the first and fifteenth days of November, 1892, of the actual value in cash of $4,000,000; and the commonwealth is therefore entitled to judgment as follows:

Value of the capital stock.....		$4,000,000 00
Tax, 5 mills.....	$20,000 00	
Interest from April 1, 1893, to January 1, 1894, at 12% per annum.....	1,800 00	
Attorney-General's commission, 5%....	1,000 00	
Total	$22,800 00	

for which amount judgment is directed to be entered in favor of the commonwealth and against the defendant, if exceptions be not filed within the time limited by law.

107 Pennsylvania State, 156.

Pullman's Palace Car Co. *v.* Commonwealth, No. 2.

1. Under the acts of assembly of Pennsylvania imposing state tax on capital stock of corporations doing business in this state, Pullman's Palace Car Company, a foreign corporation, is liable to taxation on the proportion of its capital stock invested in Pennsylvania as represented by the cars used by it in the state, whether such cars be owned or leased by said company. The fact that said cars are continuously run into, through and out of this state and are also operated in other states does not exempt the company from taxation here; it but reduces the valuation upon which the company is taxable.

216 2. Such construction of said acts of assembly does not render the same obnoxious to the provision of the federal constitution regulating interstate commerce.

June 6, 1884. Before Mercur, *C. J.*, and Gordon, Paxson, Turnkey, Sterrett, Green and Clark, *JJ.*

Error to the Court of Common Pleas of Dauphin County of May term, 1883. No. 35.

This case was in the court below and appealed by Pullman's Palace Car Company from a settlement of account by the auditor general

and state treasurer charging the said corporation with a tax on its capital stock for the years 1870 to 1880 inclusive, under the provisions of the acts of May 1, 1868, April 24, 1874, section 4, March 20, 1877, and June 7, 1879. The account was based upon the estimated rate of dividends in each year and upon the estimated proportion of capital stock taxable for Pennsylvania, and included interest and penalties for failure to report.

The defendant filed specifications of objection and the case was tried by agreement under the act of April 22, 1874, without a jury, before Simonton, *P. J.*, whose findings of fact and conclusions of law were as follows:

The defendant is a corporation of the state of Illinois, having its principal office in Chicago. Its business was during all the time for which tax is charged, to furnish sleeping coaches and parlor and dining-room cars to various railroad companies with which it contracted, on the following terms: The defendant furnished the coaches and cars, and the railroad companies attached and made them part of their trains, no charge being made by either party against the other. The railroad companies collected the usual fare from passengers who travelled in their coaches and cars, and
217 the defendant collected a separate charge for the use of the seats, sleeping berths and other conveniences. Business has been carried on continuously by the defendant in this way in Pennsylvania since February 17, 1870, and it has had about 100 coaches and cars engaged in this way in this state during that time.

About the time defendant began operations in this state, a corporation thereof called the Central Transportation Company was engaged in a like business here and had contracts with many of the railroad companies in the state to run parlor and sleeping cars on the terms stated above.

Defendant found it for its interest to purchase said contracts from said company and lease its cars for a period of 99 years, at an annual rental, covenanting to keep the cars in repair and return them or others in their place in as good order as when received at the end of that period. These cars, or most of them, as well as some of the other cars belonging to the defendant, have ever since been running in, into, through and out of the state.

The following additional facts were found by the Court:

1. That defendant transacted no business in Pennsylvania except upon the roads and in the cars covered by its lease with the Central Transportation Company.

2. That defendant leased 119 cars from the Central Transportation Company, and that said cars were more than sufficient for the transportation of all the business done by it within the State of Pennsylvania, no more than 100 cars being used in said State in any year.

3. That the cars used in the state of Pennsylvania were
218 also used in other states; their use in Pennsylvania being confined to passengers to or from points in other states.

4. That the rental paid to the Central Transportation Company for the use of its cars exceeded the gross receipts of the defendant from all its business within the state of Pennsylvania.

5. That the Central Transportation Company is a corporation of the state of Pennsylvania, and has paid to the state the full tax upon its entire capital stock for each of the years embraced in this suit.

On the facts defendant claims that no part of its capital stock is invested in this state. The argument is that its cars are personal property, and as they are not permanently located in this state, but pass into, through and out of it, this personal property has no taxable *situs* in Pennsylvania, and cannot be taxed specifically in any given locality, and therefore it is contended as the tax on capital stock is a tax on the property in which that capital is invested, the latter cannot be taxed.

It has certainly been settled by Commonwealth *v.* Standard Oil Company, 5 Out. 119, that "a tax upon the capital stock of the company is a tax upon its property and assets."

But it has never yet, so far as we know, been decided that the capital stock of a company and its property and assets are identical, or that any given part of the former represents any specific articles of the latter. It would be carrying the principle to a dangerous extreme to so decide. We hold, therefore, that the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts, and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by defendant in this state bears
219 to the whole number of miles operated by it, without regard to the question where any particular car or cars were used. Nor is it in our opinion of any consequence that some of the cars were leased for 99 years from another company on the conditions stated in the findings of fact above.

We need not even stop to determine the precise nature of the property which defendant has in them. Whatever it be, it is an asset of the company and is therefore represented by and helps to give value to its capital stock. It cannot change the case that the lessor company pays tax on its capital stock; that represents its interest, if any, in these cars. The questions involved need no further elaboration; we therefore briefly state the conclusions of law which we think are involved in the case:

1. The defendant is liable to tax on the proportion of its capital stock invested in this state as represented by coaches and cars owned and used by it here.

2. The fact that some of said coaches and cars have been leased from the Central Transportation Company for 99 years does not affect such liability.

3. The laws under which said taxes are imposed and said liability accrues are not in conflict with section 8 of article 1 of the Constitution of the United States.

4. Said company is not chargeable with penalty for failure to report, and with interest only from 60 days after the date of the settlement.

Determining the amount of the tax on the principles above stated it is as follows:

220	Tax for the years 1870 to 1880, inclusive.....	$16,321.89
	Interest from May 1, 1881, to May 10, 1883....	3,971.65
	Attorney-General's commission.....	816.09
	Total	$21,109.63

for which amount let judgment be entered unless exception be filed according to law.

The defendant excepted to the foregoing conclusions of law (other than the 4th) and filed the following additional exceptions:

9. The court erred in not finding as a conclusion of law that Pullman's Palace Car Company is not liable for taxation upon its own capital stock by reason of the cars leased from the Central Transportation Company.

10. The court erred in not finding as a conclusion of law that defendant being a corporation of the state of Illinois, is not taxable upon any proportion of its capital stock by reason of its permitting its cars to be transported into, out of or through this state, so long as they do not obtain a *situs* here.

11. The court erred in directing judgment to be entered in favor of the Commonwealth for $21,109.63.

12. The court erred in not ordering judgment to be entered in favor of defendant.

The court overruled the above exceptions and judgment was duly entered for the Commonwealth in accordance with the above decision. The defendant took this writ of error, assigning for error the dismissing of said exceptions, and the judgment.

M. E. Olmsted and O. A. Lochrane for plaintiff in error.

221 The claim in this case is controlled by the decision in Com'th *v.* Standard Oil Co., 5 Out. 119, that a tax upon capital stock is a tax upon property and assets within the state. But the Pullman Car Company had no capital invested in Pennsylvania aside from the inference sought to be drawn from its contract with the Central Transportation Company, a Pennsylvania corporation. For the convenience of the travelling public by avoiding repeated changes of cars upon connecting lines and over long routes of railroad, and to avoid inconvenience incident to the maintenance of this business under two different managements, it was found expedient in 1870 to enter into an agreement whereby Pullman's Palace Car Company became the lessee of the 119 cars of the Central Transportation Company, and undertook to perform the contracts of the latter company with the various railroads in Pennsylvania and elsewhere. By that contract the ownership of the cars remained in the Central Transportation Company, and that company has paid tax to the state on its entire capital stock, *i. e.*, on its entire property, which includes tax on these cars. To tax these cars again in the name of the Pullman Company is double taxation, not contemplated by the act of assembly. The Court found as a fact that no portion of the dividends of the Pullman Company accrued from the operation of these cars in Pennsylvania, for the rental paid to the Central Trans-

portation Company exceeded the gross receipts derived from the use of these cars in Pennsylvania.

But even if the Pullman Company owned the cars it would not be subject to taxation in respect thereof in Pennsylvania; The Pullman Company is a foreign corporation, and its cars are only temporarily in Pennsylvania while in transit to or from points in other
222 states; the cars have no *situs* here, and while being transported into, through and out of the state are protected from taxation by the commercial clause of the Federal Constitution.

State tax on foreign held bonds, 15 Wall. 319; Morgan *v.* Parham, 16 Wall. 471; St. Louis *v.* Ferry Co., 11 Wall. 423; Delaware Railroad Tax Case, 18 Wall. 229; Hays *v.* Pacific Mail S. S. Co., 17 How. 596; Com'th *v.* Standard Oil Co., 5 Out. 119; Appeal Tax Court of Baltimore Co. *v.* Pullman's Palace Car Co., 5 Md. 452.

Lewis C. Cassidy, Attorney General, and Robert Snodgrass, Deputy Attorney-General for the Commonwealth.

The opinion of the Court was delivered October 6, 1884. *Per Curiam:* We think it very clear that the plaintiff in error is engaged in carrying on such a business within this commonwealth as to subject it to the statutes imposing taxation. While a tax on the capital stock of a company is a tax on its property and assets, yet the capital stock of the company and its property and assets are not identical. The coaches of the company are its property. They are operated within this state. They are daily passing from one end of the state to the other. They are used in performing the functions for which the corporation was created. The fact that they are also operated in other states cannot wholly exempt them from taxation here. It reduces the value of the property in this state justly subject to taxation here. This was recognized in the Court below and we think the proportion was fixed according to a just and equitable rule.

Judgment affirmed.

223 EXHIBIT F FOR IDENTIFICATION (Cont'd).

141 UNITED STATES REPORTS, PP. 18–36.

PULLMAN'S PALACE CAR COMPANY
v.
PENNSYLVANIA.

Error to the Supreme Court of the State of Pennsylvania.

No. 1. Argued October 18, 1888.—Re-argument ordered November 5, 1888.—Re-argued March 6, 1890.—Decided May 25, 1891. A statute of a State, imposing a tax on the capital stock of all corporations engaged in the transportation of freight or passengers within the State, under which a corporation of another State, engaged in running railroad cars into, through and out of the State, and having at all times a large number of such cars within the State, is taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within

the State bears to the whole number of miles in this and other States over which its cars are run, does not, as applied to such a corporation, violate the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several States.

This was an action brought by the State of Pennsylvania against Pullman's Palace Car Company, a corporation of Illinois, in the Court of Common Pleas of the county of Dauphin, in the State of Pennsylvania, to recover the amount of a tax settled by the auditor general and approved by the treasurer of that State, for the years 1870 to 1880 inclusive, on the defendant's capital stock, taking as the basis of assessment such proportion of its capital stock as
224 the number of miles of railroad over which cars were run by the defendant in Pennsylvania bore to the whole number of miles in this and other States over which its cars were run.

All these taxes are levied under successive statutes of Pennsylvania, imposing taxes on capital stock of corporations, incorporated by the laws of Pennsylvania or of any other State, and doing business in Pennsylvania, computed on a certain percentage of dividends made or declared. The taxes for 1870-1874 were levied under the statute of May 1, 1868, c. 69, sec. 5, which applied to corporations of every kind, with certain exceptions not material to this case, and fixed the amount of the tax at half a mill on every one per cent. of dividend. Penn. Laws, 1868, p. 109. The taxes for 1875–1877 were levied under the statute of April 24, 1874, c. 31, sec. 4, which applied to all corporations in any way engaged in the transportation of freight or passengers, and fixed the tax at nine-tenths of a mill on every one per cent. of dividend, Penn. Laws, 1874, p. 70. The taxes for 1878–1880 were levied under the statutes of March 20, 1877, c. 5, sec. 3, and of June 7, 1879, c. 122, sec. 4, applicable to all corporations, except building associations, banks, savings institutions and foreign insurance companies, and fixing the tax at half a mill on each one per cent. of dividends of six per cent. or more on the par value of the capital stock, and, when the dividend was less, at three mills on a valuation of the capital stock. Penn. Laws, 1877, p. 8; 1879, p. 114.

A trial by jury was waived, and the case submitted to the decision of the Court, which found the following facts: "The defendant is a corporation of the State of Illinois, having its principal office in Chicago. Its business was, during all the time for which tax
225 is charged, to furnish sleeping coaches and parlor and dining-room cars to the various railroad companies with which it contracted on the following terms: The defendant furnished the coaches and cars, and the railroad companies attached and made them part of their trains, no charge being made by either party against the other. The railroad companies collected the usual fare from passengers who travelled in their coaches and cars, and the defendant collected a separate charge for the use of the seats, sleeping berths and other conveniences. Business has been carried on continuously by the defendant in this way in Pennsylvania since February 17, 1870, and it has had about one hundred coaches and cars

engaged in this way in the State during that time. The cars used in this State have, during all the time for which tax is charged, been running into, through and out of this State."

Upon these facts the Court held "that the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts; and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by the defendant in this State bears to the whole number of miles operated by it, without regard to the question where any particular car or cars were used," and therefore gave judgment for the State.

That judgment was affirmed, upon writ of error, by the Supreme Court of the State, for reasons stated in its opinoin as follows: "We think it very clear that the plaintiff in error is engaged in carrying on such a business within this Commonwealth, as to subject it to the statutes imposing taxation. While the tax on the capital stock of a company is a tax on its property and assets, yet the capital stock of a company and its property and assets are not iden-
226 tical. The coaches of the company are its property. They are operated within this State. They are daily passing from one end of the State to the other. They are used in performing the functions for which the corporation was created. The fact that they are also operated in other States cannot wholly exempt them from taxation here. It reduces the value of the property in this State, justly subject to taxation here. This was recognized in the court below, and we think the proportion was fixed according to a just and equitable rule." 107 Penn. St. 156, 160.

Pullman's Palace Car Company sued out a writ of error from this court, and filed six assignments of error, the substance of which was summed up in the brief of its counsel as follows: "The court erred in holding that any part of the capital stock of the Pullman Company was subject to taxation by the State of Pennsylvania by reason of its running any of its cars into, out of, or through the State of Pennsylvania in the course of their employment in the interstate transportation of railway passengers."

Mr. Edward S. Isham and Mr. William Barry argued for the plaintiff in error at the argument on the 18th of October, 1888.

Mr. Edward S. Isham and Mr. John S. Runnells argued for the plaintiff in error at the argument on the 6th of March, 1890.

Mr. W. S. Kirkpatrick, Attorney General of the State of Pennsylvania, argued for the defendant in error at both arguments. Mr. John F. Sanderson, Deputy Attorney General of that State, was with him on the brief in both cases.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the Court.

Upon this writ of error, whether this tax was in accordance
227 with the law of Pennsylvania is a question on which the decision of the highest Court of the State is conclusive. The only question of which this Court has jurisdiction is whether the tax was in violation of the clause of the Constitution of the United States granting to Congress the power to regulate commerce among

the several States. The plaintiff in error contends that its cars could be taxed only in the State of Illinois, in which it was incorporated and had its principal place of business.

No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used. Green *v.* Van Buskirk, 5 Wall. 307, and 7 Wall. 139; Hervey *v.* Rhode Island Locomotive Works, 93 U. S., 664; Harkness *v.* Russell, 118 U. S. 663, 679; Walworth *v.* Harris, 129 U. S. 355; Story on Conflict of Laws, sec. 550; Wharton on Conflict of Laws, secs. 297–311. As observed by Mr. Justice Story, in his commentaries just cited, "although movables are for many purposes to be deemed to have no *situs*, except that of the domicil of the owner, yet this being but a legal fiction, it
228 yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicil, and even if he is not a citizen or a resident of the State which imposes the tax. Lane County *v.* Oregon, 7 Wall. 71, 77; Railroad Co. *v.* Pennsylvania, 15 Wall. 300, 323, 324, 328; Railroad *v.* Peniston, 18 Wall. 5, 29; Tappan *v.* Merchants' Bank, 19 Wall. 490, 499; State Railroad Tax Cases, 92 U. S., 575, 607, 608; Brown *v.* Houston, 114 U. S. 622; Coe *v.* Errol, 116 U. S. 517, 524; Marye *v.* Baltimore & Ohio Railroad, 127 U. S. 117, 123.

It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction. Delaware Railroad Tax, 18 Wall. 206, 232; Telegraph Co. *v.* Texas, 105 U. S. 460, 464; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 206, 211; Western Union Telegraph Co. *v.* Attorney General of Massachusetts, 125 U. S. 530, 549; Marye *v.* Baltimore & Ohio Railroad, 127 U. S. 117, 124; Leloup *v.* Mobile, 127 U. S. 640, 649.

Ships or vessels, indeed, engaged in interstate or foreign commerce

upon the high seas, or other waters which are a common high-
229 way, and having their home port, at which they are regis-
tered under the laws of the United States, at the domicil of their owners in one State, are not subject to taxation in another State at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual *situs* within its jurisdiction, and, therefore, can be taxed only at their legal *situs*, their home port and the domicil of their owners. Hays *v.* Pacific Mail Steamship Co., 17 How. 596; St. Louis *v.* Ferry Co., 11 Wall. 423; Morgan *v.* Parham, 16 Wall. 471; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196.

Between ships and vessels having their *situs* fixed by act of Congress, and their course over navigable waters, and touching land only incidentally and temporarily; and cars, or vehicles of any kind, having no *situs* so fixed, and traversing the land only, the distinction is obvious. As has been said by this court: "Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and the Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable
waters of the earth are recognized public highways of trade
230 and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land." Railroad Co. *v.* Maryland, 21 Wall. 456, 470.

In Gloucester Ferry Co. *v.* Pennsylvania, on which the plaintiff in error much relies, the New Jersey corporation taxed by the State of Pennsylvania, under one of the statutes now in question, had no property in Pennsylvania except a lease of a wharf at which its steamboats touched to land and receive passengers and freight carried across the Delaware River; and the difference in the facts of that case and of this, and in the rules applicable, was clearly indicated in the opinion of the court as follows: "It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to taxation, provided always it be within the jurisdiction of the State." 114 U. S. 206. "While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a

domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void, as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce. 114 U. S. 211.

231 Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State cannot be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. Moran *v.* New Orleans, 112 U. S. 69, 74; Pickard *v.* Pullman's Southern Car Co., 117 U. S. 34, 43; Robbins *v.* Shelby Taxing District, 120 U. S. 489, 497; Leloup *v.* Mobile, 127 U. S., 640, 644. For the same reason, a tax upon the gross receipts derived from the transportation of passengers and goods between one State and other States or foreign nations has been held to be invalid. Fargo *v.* Michigan, 121 U. S. 230; Philadelphia & Southern Steamship Co. *v.* Pennsylvania, 122 U. S. 326.

The tax now in question is not a license tax or a privilege tax; it is not a tax on a business or occupation; it is not a tax on, or because of, the transportation, or the right — transit, of persons or property through the State to other States or countries. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation on account of its property within the State, is, in substance and effect, a tax on that property. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 196, 209; Western Union Telegraph Co. *v.* Attorney General of Massachusetts, 125 U. S. 530, 552. This is not only admitted, but insisted on by the plaintiff in error.

The cars of this company within the State of Pennsylvania are employed in interstate commerce, but their being so em-
232 ployed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the State could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the State boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them. The State, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicil, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel ex-

tending beyond the limits of the State, particular cars may not remain within the State; but the company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as a matter of fact, that the company continuously throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State.

The mode which the State of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run.

This was a just and equitable method of assessment; and,
233 if it were adopted by all of the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.

The validity of this mode of apportioning such a tax is sustained by several decisions of this court, in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this court extended to the determination of the whole case, and was not limited, as upon writs of error, to the state courts, to questions under the Constitution and laws of the United States.

In the State Railroad Tax Cases, 92 U. S. 575, it was adjudged that a statute of Illinois, by which a tax on the entire taxable property of a railroad corporation, including its rolling stock, capital and franchise, was assessed by the state board of equalization, and was collected in each municipality in proportion to the length of the road within it, was lawful, and not in conflict with the Constitution of the State; and Mr. Justice Miller delivering judgment said:

"Another objection to the system of taxation by the State is, that the rolling stock, capital stock and franchise are personal property, and that this, with all other personal property, has a local *situs* at the principal place of business of the corporation, and can be taxed by no other county, city or town, but the one where it is so situated. This objection is based upon the general rule of law that personal property, as to its *situs*, follows the domicil of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the State which recognizes it; and when it is called into operation
234 as to property located in one State, and owned by a resident of another, it is a rule of comity in the former State rather than an absolute principle in all cases. Green *v.* Van Buskirk, 5 Wall. 312; like all other laws of a State, it is therefore subject to legislative appeal, modification or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation." 92 U. S. 607, 608.

"It is further objected that the railroad track, capital stock and

franchise is not assessed in each county where it lies, according to its value there, but according to an aggregate value of the whole, on which each county, city and town collects taxes according to the length of the track within its limits." "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised, than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." "This court has expressly held in two cases, where the road of a corporation ran through different States, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each State, as the basis of taxation. Delaware Railroad Tax, 18 Wall. 206; Erie Railroad *v.* Pennsylvania, 21 Wall. 492." 92 U. S. 608, 611.

So in Western Union Telegraph Co. *v.* Attorney General of Massachusetts, 125 U. S. 530, this court upheld the validity of a tax imposed by the State of Massachusetts upon the capital stock of a telegraph company, on account of property owned and used by it within the state, taking as the basis of assessment such proportion of the value of its capital stock as the length of its lines within the State bore to their entire length throughout the country.

235 Even more in point is the case of Mayre *v.* Baltimore & Ohio Railroad, 127 U. S. 117, in which the question was whether a railroad company incorporated by the State of Maryland, and no part of whose own railroad was within the State of Virginia, was taxable under general laws of Virginia upon rolling stock owned by the company, and employed upon connecting railroads leased by it in that State, yet not assigned permanently to those roads, but used interchangeably upon them and upon roads in other States, as the company's necessities required. It was held not to be so taxable, solely because the tax laws of Virginia appeared upon their face to be limited to railroad corporations of that State; and Mr. Justice Matthews, delivering the unanimous judgment of the court, said:

"It is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the *situs* of the Baltimore and Ohio Railroad Company is in the State of Maryland, that also, upon general principles, is the *situs* of all its personal property; but for purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore and Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens

of taxation imposed upon similar property used in the like
236 way by its own citizens. And such a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawlessness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the States; but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid." (127 U. S. 123, 124.)

For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the States should concur in abandoning the legal fiction that personal property has its *situs* at the owner's domicil, and in adopting the system of taxing it at the place at which it is used and by whose laws it is protected, property employed in any business requiring continuous and constant movement from one State to another would escape taxation altogether.

Judgment affirmed.

Mr. Justice Bradley, with whom concurred Mr. Justice Field and Mr. Justice Harlan, dissenting.

(Dissenting opinion omitted.)

Mr. Justice Brown, not having been a member of the court when this case was argued, took no part in its decision.

237 "EXHIBIT F" FOR IDENTIFICATION.

145 PENNSYLVANIA STATE, 96.

THE COMMONWEALTH
vs.
D., L. & W. R. R. Co.

Appeal by the Commonwealth from the Court of Common Pleas of Dauphin County.

Argued June 3, 1891; Decided June 12, 1891.

1. The capital stock of a domestic railroad corporation represented by its equipment in use interchangeably on its lines within and without the state is taxable under section four act of June 7, 1879, P. L. 114, and section 21 act of June 1, 1889, P. L. 429, in the proportion *of* its mileage operated in this state bears to its entire mileage. Pullman's Palace Car Co. *vs.* Commonwealth, 107, Pa. 156.

2. But the capital of such company invested in real estate and other railroads outside of the state, and in vessels, barges and tugs built, registered and used wholly outside the state is not subject to such taxation; the said property being already chargeable in the states where it exists and is used; Commonwealth *v.* Dredging Co., 122 Pa., 386, distinguished.

Before Paxson, *C. J.*, Sterrett, Green, Clark, Williams, McCollom and Mitchell, *JJ.*

No. 49, May Term, 1891, Sup. Ct. Court below No. 248, January Term, 1891, C. P.

On November 11, 1890, under an account stated by the auditor general and state treasurer against the Delaware, Lackawanna & Western Railroad Co. for tax on capital stock under section 4, act of June 7, 1879, P. L. 114, and section 21, act of June 1, 1889, P. L. 429, for the year ending the first Monday of November, 1889, the company filed an appeal and specifications of objections.

On May 9, 1890, the cause having been heard on sub-
238 mission to the court without a jury, under the act of April 22, 1874, P. L. 109, the court, Simonton, *P. J.*, filed the following decision:

Findings of Fact.

1. This is an appeal from a settlement made by the auditor general and state treasurer on the 10th day of September, 1890, against the defendant for tax on capital stock for the year ending the first Monday of November, 1889, based upon a report made by defendant's secretary and treasurer as required by law. In said settlement defendant is charged with tax upon the whole amount of its capital stock of $26,200,000, amounting to $91,700. Defendant has paid $76,700 of said tax and has appealed from the remainder of said tax on the ground that it is levied on property outside of the taxing jurisdiction of the state of Pennsylvania, and that therefore the state has no right to tax said property and that the settlement is therefore invalid and unconstitutional.

2. We find the facts with reference to the situation and location of the property of defendant represented by its capital stock to be as follows:

The general office of the company is at No. 26 Exchange Place in the City of New York. Its capital stock is $26,200,000, and during the year ending as aforesaid there were declared and paid upon the said capital stock four dividends of 1¾ per centum each upon the 20th days of January, April, July and October respectively, making a total of 7 per centum for the year.

The main line of railroad owned by said company in Pennsylvania extends from the Pennsylvania and New York State line near Great Bend Village to the centre of a railroad bridge across
the Delaware river near Delaware Station, originally con-
239 structed jointly by the D., L. & W. R. R. Co., and the Warren Railroad Co., a corporation of New Jersey. The said main

line of railroad in Pennsylvania is 114.61 miles in length. In addition thereto the company owns branch railroads in Pennsylvania as follows:

Lackawanna & Bloomsburg Branch, from Scranton to Northumberland, 80 miles.

Winton Branch, from Nay Aug to Winton, 7.50 miles.

Keyser Valley Branch, from Junction with main line to Keyser Valley, 6.43 miles.

Storr's Branch, from Storr's Junction to Storr's Mine, 2.80 miles.

The defendant also operates and has therein such interest as was conveyed by the agreement, a copy of which is hereto annexed and marked Exhibit A and made part of this finding, a railroad known as the Warren Railroad, extending from the center of the railroad bridge across the Delaware river hereinbefore mentioned to a point known as the Junction in the State of New Jersey, the said road being 18.80 miles in length, all in the state of New Jersey.

The Warren Railroad Co. from which the said Warren Railroad was acquired never owned any equipment, but the said road has been at all times and still is operated by the equipment furnished by the D. L. & W. R. R. Co. It is operated as part of the main line of the D. L. & W. R. R.

In addition to the railroads above mentioned the D. L. & W. R. R. Co. does now and did in 1889 operate under lease for the various terms of years the following railroads:

(Here followed a list of railroad lines, long and short, the greater number lying outside the state.)

The total miles of railroad owned, leased or controlled and operated by the D. L. & W. R. R. Co. is 891.41, of which 217.15
240 miles are in Pennsylvania, and 673.66 in New York and New Jersey. The total equipment owned by the D. L. & W. R. R. Co. was inventoried December 31, 1889, at $8,134,823. This equipment was used upon the entire system interchangeably with the equipment of such of the leased and controlled roads mentioned as possessed their own equipment; that is to say the leased equipment of roads in other states was used in Pennsylvania, and that owned by the D. L. & W. R. R. Co. was used in other states. It is difficult to determine precisely what should be considered the equipment of the roads in Pennsylvania and what the equipment of the roads outside of Pennsylvania. But we believe it would be fair to divide the aforesaid valuation of equipment owned by the company as follows, viz.:

Value of equipment for operation of roads in Pennsylvania	$5,075,342
Valuation of equipment owned by D. L. & W. R. R. Co. used on its road outside of Pennsylvania	3,059,481

The D. L. & W. R. R. Co. owns real estate outside of Pennsylvania located and valued as follows, viz:

Binghamton, N. Y.	$23,905.52
Buffalo, N. Y.	304,790.28
New York City	201,418.48
Rochester, N. Y.	23,185.03
Chicago, Ill	51,740.60
Staten Island, N. Y.	1,609.35
Utica, N. Y.	50,388.05
Ore Lands in New Jersey	40,120.11
Syracuse, N. Y.	20,083.86

It also owns vessels, barges and tugs built, registered and used wholly outside of Pennsylvania of the value of $156,526.17.

241 3. The road owned by the D., L. & W. R. R. Co. in Pennsylvania was built primarily for the purpose of transporting to markets outside of the state the products of anthracite coal lands in said state; and the principal business of the railroads owned or leased and operated by said company in Pennsylvania does now and did in the year 1889 consist chiefly of the transportation of freight and passengers by continuous carriage upon a single way bill or ticket from points in Pennsylvania to points in other states, or from points in other states to points in Pennsylvania, or from points in another state passing through Pennsylvania to points in other states. The transportation upon said roads in Pennsylvania of freight and passengers local to Pennsylvania, that is to say between points both of which are within said state, did not in the year 1889 exceed say 19 per centum of the entire transportation business conducted upon said roads.

The ownership, interest or estate of the D., L. & W. R. R. Co. in the Warren Railroad Company is and was in the year 1889 of a fair cash value of not less than $1,000,000. In this estimate we do not include the equipment of the Warren Railroad, which is owned by the D., L. & W. R. R. Co.

An analysis of the facts shows that the total miles of railroad owned, leased or controlled and operated by defendant in the states of Pennsylvania, New Jersey and New York, amounting to 2,891.41 miles there are in Pennsylvania 217.75 miles and outside of Pennsylvania 673.66 miles; and that defendant owns the equipment of 147.31 miles of the roads outside of Pennsylvania, the remaining 526.35 miles of road being equipped by the several corporations from which the defendant has leased said roads or which are controlled by it by reason of its ownership of stock therein.

242 As it does not appear from the evidence or findings of fact that the defendant has any of its property represented by its capital stock invested in these 526.35 miles of road we think they cannot be included in any computation of the proportion of the capital stock not taxable by the state of Pennsylvania. After excluding these we have a proportion of 217.75 miles in Pennsylvania and 147.31 miles outside of Pennsylvania upon which the equipment is owned by the defendant and is used interchangeably. The total value of the equipment owned by it we have found to be $8,134,823, and therefore the proportion of defendant's capital stock

represented by this sum is taxable only in the proportion thus indicated. It is true that the findings of fact show that the equipment owned by the other roads leased or controlled by the defendant is used interchangeably upon the roads of said companies and defendant's own road in Pennsylvania, but we think this furnishes no ground for including the mileage of said roads in the apportionment; for, if this were done, we must necessarily also have the value of their equipment, which is not given, and it is fair to assume that if their equipment was not used in Pennsylvania there would be a correspondingly larger proportion of the equipment owned by the defendant in this state.

The findings of fact show that the value of the leasehold interest held by defendant in the Warren Railroad is $1,000,000. This excludes the idea that any large proportion of capital stock of defendant is represented by said leasehold interest or is invested in said road, and therefore the only exemption which can be conferred upon defendant's capital stock is the exemption of $1,000,000 of its capital stock. In arriving at these proportions we assume
243 the value of assets to be the same as the par of the capital stock, the tax being levied on the basis of the amount of dividends declared and not upon the appraisement.

The legal questions here involved are practically the same as some of those which were considered in the case of the Commonwealth *v.* Pennsylvania Co., June Term, 1889, of Dauphin County Common Pleas, and for the reason there given, which we need not here repeat, we think that the amount of the capital stock of the defendant represented by the value of its equipment should be apportioned for the tax according to the proportions 217.75 taxable and 147.31 miles not taxable, and that the amount of its capital which represents the value of its interest in the lease of the Warren Railroad, as well as the amount which represents its investment in real estate outside of the state of Pennsylvania, and the amount which represents its investment in vessels, barges and tugs built, registered and used wholly outside of Pennsylvania, are exempt from taxation by the state of Pennsylvania.

We embody these results in the following

Conclusions of Law.

1. Defendant is not liable to taxation by the state of Pennsylvania on so much of its capital stock as is represented by the value of its leasehold interest in the Warren Railroad; and the settlement hereby appealed from so far as it taxes said investment is erroneous and illegal.

2. Defendant is liable to taxation by the state of Pennsylvania only on $\frac{174.31}{365.06}$ parts of the whole amount of its capital stock invested in equipment, this being the proportion which the number of miles operated and equipped by it in the state of Pennsylvania bears to the whole number of miles operated and equipped by it;
244 and the settlement appealed from so far as it taxes any greater amount of capital so invested is erroneous and illegal.

3. Defendant is not liable to taxation by the state of Pennsylvania on so much of its capital stock as is represented by the value of the real estate owned by it outside of Pennsylvania; and the settlement appealed from so far as it taxes said amount is erroneous and illegal.

4. Defendant is not liable to taxation by the state of Pennsylvania on so much of its capital stock as is represented by the value of its vessels, barges and tugs owned by defendant which were built and are registered and used wholly outside of the state of Pennsylvania; and the settlement appealed from so far as it taxes said investment is erroneous and illegal.

5. Defendant having paid to the treasurer of the state of Pennsylvania the whole amount of tax legally due of the settlement appealed from, judgment is directed to be entered in favor of the defendant, if exceptions be not filed within the time limited by law.

To the foregoing decision both parties filed exceptions.

Said exceptions being argued, one of them filed by the Commonwealth was sustained by the following additional finding:

The company defendant is a domestic corporation, having been duly chartered by the act of March 11, 1853, P. L. 163, which act, together with the acts therein referred to, and the supplements thereto, is made a part of this finding of fact.

The other exceptions being overruled and judgment entered in accordance with the decision filed, the Commonwealth took
245 this appeal, specifying that the court erred

1, 2, in the first and second conclusions of law.

3, in not holding that the whole of defendant's capital stock invested in equipment was taxable in Pennsylvania.

4, in not holding that the whole of defendant's capital stock invested in leasehold interests was taxable in Pennsylvania.

5, 6, in directing judgment to be entered in favor of the defendant, and in not directing judgment to be entered in favor of the plaintiff for the amount claimed.

Mr. W. U. Hensell, Attorney General, and Mr. Jas. A. Stranahan, Deputy Attorney General for the commonwealth.

Counsel cited generally: Commonwealth *v.* Standard Oil Co., 101 Pa. 119; Pennsylvania *v.* Trenton Bridge Co., 9 Am. L. Reg. N. S. 298; Commonwealth *v.* Railroad Co., 29 Pa. 370; Commonwealth *v.* Railroad Co., 2 Pears. 391; Pittsb. etc. Ry. Co. *v.* Commonwealth, 66 Pa. 73; Pennsylvania Co. *v.* Commonwealth, 22 W. N. 340; Pullman's Palace Car Co. *v.* Commonwealth, 107 Pa. 156.

As to the taxation of the equipment of a domestic corporation:

Commonwealth *v.* Dredging Co., 122 Pa. 386; Pacific R. Co. *v.* Cass Co., 53 Mo. 17; Orange R. Co. *v.* Alexandria, 17 Gratt. 176; Hays *v.* Steamship Co., 17 How. 596; St. Louis *v.* Wiggins Ferry Co., 7 Wall. 423; Sangamon, etc., R. Co. *v.* Morgan Co., 14 Ill. 163, 56 Am. Dec. 497; Welkey *v.* Pekin, 19 Ill. 160; Ontario Bank *v.* Bunnell, 10 Wend. 187; Burroughs on Taxation, 186; Cooley on Taxation, 273; Balt. & O. R. Co. *v.* Allen, 17 Am. & Eng. R. Cas. 464.

246 As to its leasehold interest:

State *v.* Railroad Co. (44 Conn. ?), 7 Am. & Eng. R. Cas.

238; Archer *v.* Railroad Co., 102 Ill. 493 (7 Am. & Eng. R. Cas. 249);

Mr. M. E. Olmsted for the Appellee.

Distinguish Commonwealth *v.* Dredging Co., 122 Pa. 386, counsel cited:

Pullman's Palace Car Co. *v.* Commonwealth, 107 Pa. 156; Pullman's Palace Car Co. *v.* Twombley, 29 Fed. R. 658.

As to defendant's interests in the Warren Railroad:

Commonwealth *v.* Standard Oil Co., 101 Pa. 119; Commonwealth *v.* Dredging Co., 122 Pa. 386; Caldwell *v.* Fulton, 31 Pa. 475; Delaware, etc., R. Co. *v.* Sanderson, 109 Pa. 583; Cincinnati College *v.* Yeatman, 30 Ohio St. 276.

Per Curiam: We are unable to see that the ruling of the court below is in conflict with Commonwealth *vs.* Standard Oil Co., 101 Pa. 119. That company is a foreign corporation, and it was held that it was not the intention of our taxing acts to tax the whole capital stock of such corporations doing business within this Commonwealth irrespective of the place of its investment, but to tax the property of such company, that is to say its capital stock, to the extent that it brings such property within the state in the transaction of its business. This is the only equitable rule which will secure to the Commonwealth its fair proportion of tax and yet enable such corporations to carry on their legitimate business. For, if a corporation having its *situs* in one state and transacting business in every other state of this country can be taxed in each state to the full amount of its capital stock, the result is confiscation.

The defendant here is a domestic corporation, and it was
247 contended that its capital invested in equipment used interchangeably on its main line in this state, and its leased lines in other states, is not exempt from taxation in this state. The court below held otherwise, and from this decision the Commonwealth has appealed.

It is true that the *situs* of a domestic corporation is in this state, and that for many purposes the domicil of the person, whether natural or artificial, draws to it the personal property belonging to such owner. That this is so as to such intangible property as is not the subject of taxation elsewhere, such as money at interest, may be conceded; but for the purposes of taxation tangible personal property has a *situs* wherever it may be found. Hence it was held in Pullman's Palace Car Co. *vs.* Commonwealth, 107 Pa. 156, the said company being a foreign corporation, that the proportion of the capital stock of the company invested and used in Pennsylvania is taxable here, and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by the company in this state bears to the whole number of miles operated by it, without regard to the question where any particular car or cars are used, this court saying in its opinion:

"They (the cars) are operated within this state. They are daily passing from one state to the other. They are used in performing the functions for which the corporation was created. The fact that they

are also used and operated in other states cannot wholly exempt them from taxation here."

This case has recently been affirmed by the Supreme Court of the United States, although the report of the case has not yet reached us. On the other hand, we held in Commonwealth *v.* Dredging Co., 122 Pa. 386, that the dredges which were the subjects of the con-
248 troversy were taxable at the *situs* of the company for the reason that although wholly used outside of the Commonwealth they did not remain at any one place long enough to render them liable to taxation there, this court saying in its opinion:

"From the nature of the business it is in one place to-day and in another to-morrow, and hence not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here it escapes altogether."

It may be that in the case of a domestic corporation the Commonwealth would have the power to tax its entire capital stock, no matter where found or how invested, and notwithstanding that the whole or the greater portion of its stock only was invested in tangible property located and used in other states and liable to taxation by the laws of those states. But the Commonwealth is not a bandit with a pistol at the throat of every property owner. On the contrary, she imposes no greater burdens than the necessities of the state require; and she endeavors at least to impose those burdens in as equitable a manner as the wisdom of the legislature and the difficulties of the subject admit.

We do not think it was error for the learned court below to hold that the defendant was not liable to taxation by this state on its interest in the Warren Railroad. That road is wholly outside of the state; and whatever the defendant's interest therein may be, it is liable to taxation by the state of New Jersey. We think it comes within the principles above indicated.

Judgment affirmed.

249 American and English Railroad Cases (New Series), Volume 14, page- 145-174 (188 Penna., 169).

Commonwealth
v.
New York, P. & O. R. Co.

(Supreme Court of Pennsylvania, Oct. 17, 1898.)

Taxation—Capital Stock.—Within the meaning of the act of 1891 of Pennsylvania, providing for the taxation of "all the property of corporations * * * having capital stock, at the rate of five mills on each dollar of its actual value," a tax on the capital stock is a tax on the property and assets, including the corporate franchises.

Same—Same—Deduction of Indebtedness.—Under such statute the question of the actual value in cash of the capital stock is a question of fact, which must be determined by considering the value of the corporate property, and assets of every kind, including its bonds

and mortgages, and moneys at interest, and its franchises and privileges, and the amount of the incumbrances on its property and franchises is also a relevant fact to be considered, but the corporate indebtedness, though it should be considered, is not to be specifically deducted from the valuation so ascertained and determined.

* * * * * * *

FINDINGS—PRESUMPTIONS.—Defendant's counsel having made no request for a specific finding as to what extent the value of its capital stock was effected by its indebtedness, it will be assumed that such element was properly considered.

VALUE OF CAPITAL STOCK—DISCRIMINATION.—Under such statute, the actual value of capital stock being a pure question of fact, a corporation cannot complain of discrimination in the method
250 adopted to ascertain such value so long as its stock is not assessed in excess of such value.

Appeal by the company from Dauphin county court of common pleas. *Affirmed.*

The findings of fact and opinion of the court below are as follows:

This is an appeal from a settlement made by the auditor general and state treasurer against the corporation defendant June 30, 1896, for tax on capital stock for the tax year 1895. It was tried by the court without a jury, as provided by the act of April 22, 1874, and, on the testimony and documentary evidence, we find the following facts:

"(1) Defendant is a corporation chartered under the laws of the states of New York, Pennsylvania and Ohio, owning a line of railroad extending from Salamanca, New York, across the northwestern part of the state of Pennsylvania, to Dayton, Ohio, a distance of 388.04 miles. Of this line, 92.4 miles are within the state of Pennsylvania, and the remainder in either New York or Ohio. Defendant also owns a line of railroad 33.78 miles in length, known as the 'Franklin Branch,' extending from Buchanan to Oil City, all in Pennsylvania. It also owns a branch 7.7 miles in length in Ohio; making the total mileage owned by it 429.52 miles. It is also lessee of 168.09 miles of road, of which 34.54 miles are in Pennsylvania, and the remainder in Ohio. It connects at Salamanca, its eastern terminus, with the railroad of the New York, Lake Erie and Western Railroad Company, and by a connection at Dayton, Ohio, its western terminus, it forms, by means of leases and trackage contracts, part of the through line of the last named road from the city of New York to the cities of Cincinnati and Chicago.

"(2) Defendant's capital was, in 1895, $44,999,350, divided into 899,987 shares, of the par value of $50 each; 200,000 shares,
251 or $10,000,000, being preferred stock, and 699,987 shares, or $34,999,350, common stock. The cost of defendant's road and equipment was $170,987,519.58. No dividends were ever paid on either the preferred or common stock.

"(3) In 1895 defendant's indebtedness amounted to $129,853,080.72, as follows: Prior lien bonds, $8,000,000; first-mortgage bonds, $44,337,000; deferred warrants converted into first mortgage bonds, representing unpaid interest on $27,640,345.75; second mort-

gage bonds, $14,500,000; third mortgage bonds, $30,000,000; car trust agreements, subject to which the company held its active rolling stock, $1,950,900, and a small unsecured balance. Defendant has not for many years earned or paid any interest on its second or third mortgage bonds, and no interest was paid in 1895, on its first mortgage bonds, though some was earned. The interest on the $8,000,000 prior lien bonds was paid. Nearly all defendant's indebtedness is due to citizens or corporations of other states and countries than Pennsylvania.

"(4) In April, 1883, it leased its line and road to the New York, Lake Erie & Western Railroad Company, for ninety-nine years, the terms of the lease requiring the lessee to pay to defendant thirty-two per cent. of the gross receipts derived from the operation of the road. The gross receipts in the tax year 1895 amounted to $6,332,317.52, and the proportion due to defendant was $2,062,000. In 1893 the lessee became insolvent, and passed into the hands of receivers appointed by the circuit court of the Southern district of New York; and by virtue of an agreement not clearly explained in the evidence,
and of a decree of that court, the receivers were ordered to pay
252 to the defendant, instead of the agreed rental, only the net
earnings received from the operation of its road, not less, however, than $1,500,000; and defendant, during the tax year 1895, actually received as rental only $1,411,573.96, and it had during that time receipts from other sources amounting to $52,029.49. During its fiscal year ending June 30th, 1895, its gross income from all sources was $2,042,307.15, and during 1895 there were expended upon its road, in betterments, $2,931,686.31. From what source the amount thus expended was derived is not definitely shown by the evidence.

"(5) During the months of April, May and June of 1895, 4,200 shares of the preferred stock of the defendant were sold, in the city of New York, at prices ranging from 62½ to 87½ cents per share, the average price being 75 cents. There were no shares of common stock sold during the tax year 1895.

"(6) An order of sale of defendant's road was granted in January, 1896, at the suit of the holders of the bonds secured by the first mortgage on its road and franchises; and, in pursuance of this order, all of its property, leasehold and otherwise, including defendant's franchises, was on the 26th of February, 1896, sold at public auction, at the court house in Akron, Ohio, for the sum of $10,000,000, subject to the prior lien mortgage of $8,000,000; and the proceeds of the sale were appropriated towards the payment of the first mortgage bonds, the holders of subsequent liens receiving nothing.

"(7) On February 21, 1896, the secretary and treasurer of the defendant company, after having taken the oath prescribed by the act of June, 1891, made the report to the auditor general required by
said act, and appraised the capital stock of said corporation as
253 of no value whatever. The auditor general and state treasurer
being dissatisfied with the appraisement and valuation so made and returned, value- and appraised the capital stock of defendant for the tax year 1895 at $34,480,577.70, stating at length in their

appraisement their reason for so doing, and settled an account in accordance with said appraisement, charging defendant with a tax at the rate of five mills, amounting to $172,402.88, from which settlement defendant appealed to this court; and, on the trial, the report and appraisement made by the defendant's officers, the appraisement and settlement made by the auditor general and state treasurer, defendant's specifications of objections to the settlement, and other evidence, oral and documentary, was offered and heard.

"(8.) After a full consideration of all the relevant evidence in the case, we find that the appraisement made by the defendant's officers is not correct, and that the appraisement made by the auditor general and state treasurer is excessive; and we further find that the actual value in cash of defendant's capital stock, representing its tangible property and its franchises between the 1st and 15th of November, 1895, was $15,000,000, and that defendant is taxable for the tax year 1895, at the rate of five mills on 126.18—510.20 of said fifteen millions, that being the proportion of defendant's capital stock which represents the proportion of its road, property, assets, franchises and privileges in Pennsylvania, calculated on the mileage basis.

"*Discussion.*

"In Com. *v.* Standard Oil Co., 101 Pa. St., 119, Mr. Justice Paxson, delivering the opinion of the court, said: 'It has been re-
254 peatedly decided, and is settled law, that a tax upon the capital stock of a company is a tax upon its property and assets,'—citing a number of cases in this state, and many from other states. In Appeal of Fox, 112 Pa. St. 337, 4 Atl. 149, it was held that the mortgages owned by corporations are taxed through the tax on capital stock in substantially the same manner as the mortgages belonging to individuals are taxed by the act of 1885, which requires them to report to the assessors and pay a tax upon the par value of their mortgages, and that, if corporations were required to report and pay tax under that act of 1885, the result would be double taxation. Speaking in this case of capital stock in itself considered, Justice Paxson says: 'The capital stock is nothing, a myth; a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock. Hence it is that the courts have long since declared that a tax upon the capital stock of a corporation is a tax upon the assets and property of such corporation.' The opinion of the court below in Com. *v.* Western Land & Imp. Co., 156 Pa. St. 455, 26 Atl., 1034, contains a history of this tax, and shows that it has always been assessed on the basis of the rate per cent. of dividends when the dividends during the tax year equalled or exceeded six per cent., and, when no dividend was made, on an appraisement of the capital stock; and when the dividend was less than six per cent., under some of the acts, the tax was assessed on the basis of the rate per cent. of the dividend and, under others, on the assessed value of the capital stock. That case decides that, when the tax is measured by the rate per cent. of the dividend, that is the only test; and some of the cases

there cited illustrate this very forcibly, and show that the
255 value indicated by the rate per cent. is sometimes very different from the actual value. Thus, in Atlantic & Ohio Tel. Co. *vs.* Com., 66 Pa. St. 57, where the report of the officers of the corporation stated that a dividend of ten per cent. had been made, it was held that the dividend reported furnished the measure of the tax, although the corporation proved that it has in reality been paid upon a part only of the stock. And in Columbia Conduit Co. *vs.* Com., 99 Pa. St. 307, where, after declaring dividends amounting to $200,000, a loss by fire occurred to which nearly one-half of the declared dividend was applied, instead of being paid to the stockholders, the whole dividend was, nevertheless, held to furnish the measure of the tax. And in Maston's Ford Bridge Co. *v.* Com., 117 Pa. St. 265, 11 Atl. 813, where all the property of a corporation with a capital of the par value of $45,000 was converted into money, and amounted to $75,000, the excess of $30,000 above the par value of the capital stock was held to be a dividend, and the company was assessed thereon with a tax of one-half mill on each one per cent. amounting to $1,500, which would be a three-mill tax upon $500,000. And in Com. *v.* Fall Brook Coal Co., 156 Pa. St. 488, 26 Atl. 1071, it was decided that a tax on the capital stock of the Fall Brook Railway Company was a tax on $3,500,000, which the Fall Brook Coal Company held invested in the shares of the railway company, and that to tax that amount of the capital stock of the coal company after the railway company had paid the tax on its capital stock would be double taxation.

"It thus appears that under the acts taxing capital stock, as they stood prior and up to 1891, the amount of dividend declared during the tax year was the only test of the amount of the tax, and that this had no necessary relation to the actual value of the capital
256 stock of the corporation. When the dividends did not amount to the rate which by the taxing acts was made the measure of the tax, the capital stock of the company was required to be appraised, and a tax at the rate of originally three mills afterwards five, was assessed upon its appraised value. This appraisement, it is true, was formally of the capital stock, and not of the property of the corporation; and the data required to be furnished to the auditor general, by the terms of the acts, to enable him to judge of the correctness of the appraisement, related to the operations of the company during the year, the amount of its capital stock, and the value of its shares, more directly than to the quantity, quality, and value of its assets and property. The inference sought to be drawn from this by the learned counsel for defendant is that, as the value of the shares would be affected by the amount of indebtedness and incumbrances upon the property of the corporation, the practical result was that the tax, so far as it was a tax upon the property of the company, was a tax only on the value of its property, less the amount of its indebtedness and incumbrances; but it must be remembered that this basis of assessment was adopted in 1844, when the corporations to which it applied were mainly banks and other moneyed institutions which did not have incumbrances, and

whose indebtedness was mainly for deposits that were a source of profit to the corporations.

The subjects of the tax are said in the act of 1844 (P. L. 486) to be 'all banks, institutions and companies.' An appraisement of the shares of such corporations at not less than the price at which they sold in the market would furnish a fairly accurate measure of the value of the assets and property of the company. That
257 by 'institutions,' in the act of 1844, the legislature intended moneyed corporations, is shown by the act of April 16, 1845 (P. L. 507), where the subjects of the tax on capital stock imposed by the act of 1844 are styled 'banks and savings institutions.' And in the capital stock act of 1859 (P. L. 529) the subjects of the tax are styled 'banks, savings institutions and companies whatsoever.' It was not until after the passage of the act of February 23, 1866 (P. L. 82), that banks ceased to be the principal corporations subject to the tax on capital stock. By the act of May 1, 1868 (P. L. 108), the amount of the dividend declared by the corporation was made the measure of the tax on its capital stock in every case where any dividend was made, and it was only in cases where no dividend whatever was made that the officers of the corporation were required 'to estimate and appraise the capital stock of such companies at its actual value in cash.' This act contains no suggestion that the appraised value should be the value of the property and assets of the corporation less its indebtedness. The act of April 24, 1874 (P. L. 68), which superseded the act of May 1, 1868, was practically identical with it on this subject, except that the officers of the corporation were required to estimate and appraise the capital stock of such companies upon which no dividend had been made or declared, at its value, not less than the average price which said stock sold for during said year;' and that it also contained the proviso 'that if the auditor general or state treasurer, or either of them, is not satisfied with the valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, and to settle an account upon the valuation so made for the taxes, penalties and interest due the commonwealth.' This proviso contains at least an implica-
258 tion that, even if the appraisement were not less than the average selling price, it might be too low, and no restriction was put upon the accounting officers in making the appraisement, nor did the act require them to deduct incumbrances. The act of June 7, 1879, required the capital stock to be appraised when no dividend or dividends less than six per cent. had been declared during the year and contained a further limitation of minimum value in the appraisement, by requiring not only that it should be 'not less than the average price which said stock sold for during said year,' but also that it must be not less than the average price or value as indicated or measured by the amount of dividends made or declared.' Under this act occurred the case of Hamilton Steeled Wheel Co. v. Com. 12 Wkly. Notes cas. 328, where $1,000,000, the whole capital of the corporation, had been invested in patent rights which would soon expire, and the officers of the company appraised the capital stock for the year 1879 at $110,000, and for the year 1880 at

$100,000, on the theory that as the patent had only two years to run, and the whole value of the capital stock was invested in the patent, the stock was not worth more than that amount. The company, however, had made a dividend of four per cent., which, in the judgment of the accounting officers, indicated a value of at least $500,000, and they therefore assessed it at that amount. The court below decided that under the circumstances the value of the capital stock 'must be as measured and indicated by the amount of dividends made and declared. However unjustly it might operate in particular cases, there can be no doubt of its meaning and the manner of valuing which it indicates and points out.' On appeal to the Supreme Court, this ruling was affirmed, on the opinion of
259 the learned judge of the court below, President Judge Pearson. The next act in order was the act of 1889, which contained the same minimum limitation of value as the act of 1879.

"We thus find that, under all the acts taxing capital stock, the amount of tax was either fixed by the rate per cent. of the dividends (in which case that was the sole measure of the tax, regardless of the actual value of the property and assets of the corporation), or it was imposed on the appraised value of the stock, subject to the limitation in the earlier acts, that the amount of the appraisement should not be less than the value indicated by the selling price of the stock (which would fairly indicate its value when the subjects of the tax were banks and institutions of that nature), and afterwards by the limitation that it should not be less than the value indicated by the amount of dividends or profits made. The nature of the test of value was in all cases an inquiry into the result of the activity of the corporations for the tax year, and an inference of value from these results, rather than a direct estimate of the value of the tangible property and assets of the corporation. There was, we think, ample reason for this. The value of the property and assets of a railroad corporation, for instance, cannot be ascertained by appraising its buildings, rails, bridges, cars, etc. It is all these in operation—their use as a railroad, with the franchise or right to use them, and to charge fares and freight for so doing—that really constitute the property and assets of the corporation; and this is what is represented by its capital stock. There has been, however, a large class of cases in which it became necessary to have a more direct reference to the tangible property and assets of the corporation in making the appraisement. This was so in all cases where, by the terms of the taxing act, or because of the nature or *situs* of the property
260 of the corporation, some of it was subject to taxation, and some exempt. Thus, the capital stock of manufacturing corporations has been since 1885 exempt from taxation; but as this exemption was held to apply only to the proportion of the capital stock that represented property actually used in the business of manufacturing, while property not so used was held taxable, it became necessary to ascertain the value of the property in order to determine the proportion of the capital stock taxable and exempt. And when corporations, whose capital stock was subject to the tax, owned property which could not be taxed because of its nature,—as,

for instance, patent rights or United States bonds,—or because it was located out of the state, it became necessary to ascertain the actual value of the property. Com. *v.* Westinghouse Air Brake Co., 151 Pa. St. 276, 24 Atl. 1111, 1113; Com. *v.* Westinghouse Electric & Mfg. Co., 151 Pa. St. 265, 24 Atl. 1107, 1111; Com. *v.* Juniata Coke Co., 157 Pa. St. 507, 27 Atl. 373; Com. *v.* Pennsylvania Coal Co., 5 Co. Ct. R. 89, and Com. *v.* MontgomeryLead and Zinc Min. Co., *Id.* 91,—are cases of this kind, as is also Com. *v.* Standard Oil Co., 101 Pa. St. 119.

"Another like case is Com. *v.* Pennsylvania Co., 145 Pa. St. 274, 23 Atl. 549, to which the learned attorney general has referred. This case was elaborately argued and considered in the court below, where it was conceded that if the corporation was taxable at all, which was denied, the tax was upon its property and assets, and that the value and nature and *situs* of these must be ascertained in order to determine the amount of the tax, and the date from which these could be ascertained was furnished by the defendant. The
261 court below decided that the defendant was taxable on the amount of its capital stock represented by investments in real estate in Pennsylvania, personal property in Pennsylvania stocks of foreign corporations, bonds of foreign corporations, and bonds of domestic corporations, and on the proportion of its capital stock represented by investments in equipment or rolling stock which was found to be within the state, by apportioning the whole amount invested in equipment on the basis of its mileage within and without the state, as shown by the facts and exhibits. The case was appealed to the supreme court, and error was there assigned to these rulings, and to these only; and the case was argued on the questions thus raised, but none of these questions were decided by the supreme court. The only point decided was, as stated at the close of the opinion (145 Pa. St. 283, 23 Atl. 552), 'that after the lapse of a year from the time of payment of the taxes of a current year, without any request for the restatement of the account of the taxpayer, the account is closed, except as to clerical mistakes, and can only be reopened by an order of the board of revision.' This was an application of the provisions of section 16 of the act of March 30, 1811, relative to public accounts (which had been applied by the court below to the settlements for 1872 and 1873, because for those years the accounts were resettlements), to the settlements for the subsequent years, which were original settlements, and not resettlements. That this was done under a misapprehension of the facts is manifest. The learned justice who wrote the opinion evidently supposed that all the state taxes to which a corporation is subject for a given year are settled and included in one account, and did not know that it is, and always has been, the uniform practice of the accounting
262 department to require reports and settle accounts separately for each kind of tax to which a corporation is subject, and that a settlement for one kind of tax does not imply any consideration or determination of its liability or otherwise for tax of a different kind. An account or settlement is a physical, tangible thing,—a paper with figures and writing upon it, signed by the auditor general

and state treasurer, indorsed, copied into a ledger, and filed away in its appropriate place. Whether such a settlement has been made against a given corporation, for a tax of a given year, is therefore a question of fact, to be ascertained by looking in the proper place for the settlement. Such inspection showed at the time this case was tried, and it would now show, that there had never been any settlement made against the Pennsylvania Company for the years from 1874 to 1887, inclusive, for tax on capital stock; and the court below found this as one of the facts in the case. The settlements then in question for those years were therefore original settlements, and not resettlements, as was supposed, while those for 1872 and 1873 were resettlements; and this is the reason why the court below held the latter invalid, and those for the subsequent years valid. It was not claimed by the counsel for defendant, who are experts in tax cases, that the settlements for the years subsequent to 1873 were resettlements; and therefore the ruling of the court below on this subject was not assigned for error, and hence the supreme court were not assisted by the argument of counsel in coming to the conclusion reached by them which probably accounts for the misapprehension. The result is that we are without a decision of the court of last resort on the question decided in the court below, and discussed in the supreme court. The case is, however, valuable, as it shows that
263 it was conceded and understood, both by the counsel and the court, that the tax in question was the tax upon the property of the corporation, the value of which it was necessary to appraise, and that the only controversy—if the corporation was taxable—was as to the method of apportionment and that it was not even suggested by the learned counsel that the indebtedness of the corporation should be deducted in order to ascertain the value.

"We have now reviewed all the acts taxing capital stock prior to the act of June 8, 1891 (P. L. 229), and referred to many of the decisions in which these acts are construed and applied; and we have nowhere found it to be enacted or decided that, in estimating and appraising the value of the capital stock, any deduction is to be made because of the fact that the property of the corporation is incumbered. This question has, it is true, never been directly litigated and adjudicated, but the implication contained in the acts, from the fact that there is no provision on the subject, and that no claim has ever been made for a deduction of this account, is strong that such was not the intention of the acts. It remains to consider the effect of the act of 1891, under which the settlement appealed from in this case was made. The title to this act is 'An act to provide increased revenues for the purpose of relieving the burdens of local taxation * * * and providing for greater uniformity of taxation by taxing all the property of corporations, limited partnerships and joint stock associations having capital stock, at the rate of five mills on each dollar of its actual value.' We think we find here a distinct declaration that the purpose of this act is to impose a tax upon the property of the corporation to which it applies.

Defendant's counsel contends that the antecedent of 'its,'
264 in the concluding words of the title, 'five mills on each dollar of "its" actual value,' is 'capital stock.' But the plain reading of the sentence, required alike by its grammatical and logical construction, is that it declares an intention to tax 'at its actual value in cash all the property' of certain corporations, limited partnerships, and joint-stock associations, to wit, those 'having capital stock.' This construction is not in conflict with the expressions used in preamble 6, where it is evident that 'capital stock' is used as a synonym for bonds, mortgages and moneys at interest, and franchises and property of other kinds; and, being so used in the preamble, we think we are warranted in assuming that it is used in the same sense in the body of the act. This act also made important changes in the method of assessing the tax. The rate per cent. of dividend is no longer the measure of the amount of tax, but in all cases the capital stock is to be estimated and appraised by the officers of the corporation 'at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund.' And the act further provides 'that if the auditor general and state treasurer, or either of them, is not satisfied with the appraisement and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, based upon the facts contained in the report herein required or upon any information within their possession or that shall come into their possession, and to settle an account on the valuation so made by them for the taxes, penalties and interest due the commonwealth thereon.' And, while it is the capital
265 stock that is to be appraised, we have just seen that the title of the act declares that the property is to be taxed, and preamble 6 defined what is meant by 'capital stock' when it declared that the tax is to be imposed on 'their whole capital stock,' including as well their bonds, mortgages and moneys at interest, as their franchises and property of other kinds.'

"In settling accounts against various corporations for the first year after this act came into force, the auditor general construed the proviso that the actual value in cash was to be 'not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund' to prescribe a hard and fast rule that the capital stock must be appraised at not less than a principal sum, six per cent. of which would equal the net earnings of the corporation for the tax year. And he settled accounts on that basis against a number of corporations, from which settlements they appealed to this court, where, on the trial of the cases, it was decided that this construction of the act was erroneous; that the net earnings constituted only one fact to be considered in determining the actual value of the capital stock, and that the amount and rate per cent. of dividends made and the amount accrued to surplus and sinking fund during the tax year do not furnish an absolute indication or measure of the actual value in cash of the capital stock of a corpora-

tion, but are to be considered with all other relevant facts in determining what is its actual value; that the prominent idea or thought of the whole act was to base taxation on the actual cash value; and that this should be determined from facts, and not theories, on all cases except the one that this value should in no case be less than the average price at which the stock sold during the year.
266 Com. *v.* Edgerton Coal Co., 164 Pa. St. 284, 30 Atl. 125, 129. And in Commonwealth against Haney Transfer Co. (141, Jan. term 1895), decided by this court, and not reported, it was said, in the opinion of Judge McPherson, that the question of actual value in cash is a question of fact, which must be determined by considering the value of defendant's tangible property, the amount of its business, the rate of dividend declared, and the extent and value of its good will and franchises and privileges, as indicated by the evidence bearing upon those subjects at that particular time. In Com. *v.* Delaware, S. & S. R. R., 165 Pa. St. 44, 30 Atl. 522, 523, it was contended by the defendant that the franchises of a corporation were not to be included and appraised in estimating the value of its capital stock. But we decided that the franchise of the corporation was an element to be considered in ascertaining the value of capital stock; and it was said in the opinion of the supreme court, affirming this decision (page 54, 165 Pa. St., and page 523, 30 Atl.): 'In ascertaining the actual value of the capital stock, was it proper to take into consideration, as affecting that value, the franchises of the company? We think this question is affirmatively answered by the act of June 8, 1891, under which the valuation was made. The capital stock represents the franchises as well as other property of the company. In the sixth preamble of the act there appears a plain legislative purpose to include the franchise in fixing the value of the stock, and this is in harmony with the title and the provisions in respect to the taxation of it.'

"The able counsel for defendant lays great stress on the fact that, in the taxing acts and in the decisions of the courts construing them, it is the capital stock which is said to be taxed, but a care-
267 ful reading of the acts and the decisions will show that the words 'capital stock' are used as a convenient term to connect property, tangible and intangible, of the corporation. This is implied when it is said that a tax on the capital stock is a tax on the property and assets of the company; and when it is enacted that the tax shall be 'at a fixed rate of five mills upon each dollar of the actual value of their whole capital stock, including as well their bonds, mortgages and moneys at interest, as their franchises and property of other kinds;' and more definitely still when it is declared in the act of 1891, 'that for the purpose of this act interests in limited partnerships or joint stock associations shall be deemed to be capital stock and taxable accordingly.' That is to say, as a matter of fact, a limited partnership has no 'capital stock,' in the common acceptation of the term, but every partner has a definite proportional interest in the assets of the company, and, for the purpose of taxation under this act, this interest 'shall be deemed to be capital stock and be taxable accordingly.' Clearly, then, when nominally the

capital stock is taxed, it is in reality the property and assets of the company that are taxed, and the only way in which the value of the capital stock can be ascertained is by ascertaining the value of the property and assets. This illustrates the truth of the remark made by Mr. Justice Paxson, already quoted, that 'the capital stock is nothing; a myth, a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock.' In a limited partnership it is literally nothing but a name apart from the assets, and in a corporation proper it is really nothing more, although we are accustomed to conceive of it as a separate entity.

268 "Counsel also argues that the form of the report required to be made by the act of 1891 does not call for a statement of the amount and value of the property and assets of the corporation, and, therefore, that it is not the property that is to be appraised. But, as we have seen, the value of the property must be ascertained whenever the tax is to be apportioned or a limited partnership is to be taxed, and, while it is true that the form of the report does not call for such definite information as to the actual value of the property and assets of the corporation as it might, the reason probably is that in the main it was copied from the prior acts without careful attention to the change.

"The conclusion that the value of incumbrances should not be deducted would seem to be greatly strengthened when the matter is examined in the light of the doctrines in Com. *v.* Fall Brook Coal Co., 156 Pa. St. 488, 26 Atl. 1071. It is there decided that the capital stock of the corporation, and the shares into which the capital is divided, are, at least for the purpose of taxation, identical, and that the shareholders are the real owners of the property and assets, which both the capital stock and the shares represent, and that they are the persons who are taxed when a tax is imposed upon either the capital stock or the shares. A corporation is (page 494, 156 Pa. St., and page 1071, 26 Atl.) said to be 'an artificial person created by law for the purpose of becoming the business representative, agent, or trustee of so many persons as may join to furnish the money with which the business to be done by the corporation may be carried on. * * * The money furnished by those whose representative it is to be is its capital stock. The amount that each person contributes to this fund is his share in the venture, and is called his

269 share or shares in the stock. The legal title to the whole sum so contributed is in the corporation, and so the legal title to all the property, real or personal, in which it may be invested. The equitable title—that is, the right to the profits from the business done, and to a return of the capital when the corporation is dissolved—is in the stockholders. * * * As in the ordinary case of trustee and *cestui que trust*, the real owners are the beneficiaries. The opinion in this case also states that the principle upon which it is proper to tax land without regard to the incumbrances upon it is that there is no community of interest between the owner of the land and the owner of the money borrowed and invested in the land, and that to tax both is not double taxation; that 'in

that case there are two distinct subjects of taxation, each of which is made taxable by an express provision of the law. The farm is taxable as land, against whoever may be the owner, without regard to the incumbrances upon it. The sum secured by the mortgage is taxable as money at interest, regardless of the use the borrower may make of it. If the owner of the land is compelled to incumber it, it may be his misfortune; but the man who lends money to him has no connection with him in title. There is in such case no double taxation. The land is taxed once to its owner. The money at interest is taxed once to its owner. They are distinctly different taxpayers, and pay taxes upon distinctly different subjects of taxation.

"We have, then, these principles: A tax on the capital stock of a corporation is a tax on its property and assets. The corporation is simply a trustee for its stockholders, and they are the real owners of the property, or, as expressed by the learned justice, it is 'the ordinary case of trustee and *cestui que trust.*' The beneficiaries
270 are the real owners. And whether the property is taxed in the name of the corporation or in the name of the shareholders, the ultimate burden falls upon the same persons. The facts that the tax is called a tax on capital stock is therefore not of the essence of the matter. Whatever called, it is a tax on the property and assets of the shareholders for whom the corporation is simply trustee. Neither is it vital that it is taxed in the name of the trustee. The shareholders are the real owners of the property taxed, and the tax is therefore a tax on their property. But, when the property of individuals is taxed, no reduction is made because the property is incumbered. It is therefore not easy to see why there should be any specific reduction made for individuals simply because their trustee is a corporation. As was said by Mr. Justice Miller, in State Railroad Tax Cases, 92 U. S., at page 605: 'Individuals do not escape taxation on their real and personal property because they are insolvent. * * * No state has ventured to establish the principle of permitting its visible tangible property to escape taxation, relying solely on a tax imposed on the individual on the basis of his estimated wealth in excess of his debts.' The consequence of establishing such a principle in Pennsylvania would be so serious that we cannot believe the legislature has ventured so to do. There are, as is well known, many railroad corporations in the state, which like the one in question in this case, were built at an extravagant cost, met chiefly by borrowed money, which are now insolvent, and whose net earnings are not sufficient to pay the interest on their sometimes enormous funded debt, yet they are valuable franchises which have been granted by the state, as well as tangible property,
which, for the uses to which it is applied, is worth in many
271 cases millions of dollars. All these, under the construction of the act of 1891 contended for on behalf of defendant, would entirely escape taxation by the state, and are not subject to local taxation, while the property of individuals who have no franchise from the state is taxed without regard to their insolvency. And the injustice and impolicy of such a construction is presented in a yet stronger light when we remember that in many cases—

and notably in the one now before us—nearly all the funded debt secured by the incumbrances on the insolvent corporation's property is held by residents of other states or foreign countries; so that, if it is not taxable against the insolvent corporation, neither can it be reached, in theory even, by taxing the evidences of indebtedness. The result would be that property within the borders of the state worth many millions of dollars would be entirely exempted from taxation.

"Conclusions of Law.

"(1) A tax on the capital stock of a corporation is a tax on its property and assets, including its franchises. The question of the actual value in cash of the capital stock is a question of fact, which must be determined by considering the value of defendant's tangible property, and assets of every kind, including its bonds, mortgages and money at interest, and its franchises and privileges; and the amount of the incumbrances on its property and franchises is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined.

"(2) The commonwealth is entitled to recover from defendant in this case a tax at the rate of five mills on the dollar on the actual value in cash of 126.18–510.20 parts of the capital stock of
272 defendant amounting to.....with interest at the rate of twelve (12) per cent. from September 30, 1896, and attorney general's commission at the rate of five (5) per cent.

"(3) Judgment is therefore directed to be entered in favor of the commonwealth and against the defendant as follows:

Tax, five (5) mills on.....
Interest at twelve (12) per cent. per annum from October 1, 1896, to April 8, 1897
Attorney General's commissions, 5 per cent.....

Total .....

"

M. E. Olmsted, for appellant.
John P. Elkin, Dep. Atty. Gen., and Henry C. McCormick, Atty. Gen., for the Commonwealth.

DEAN, *J.:*

All the material facts of this case are stated in the opinion of the court below. The finding of a fact determines the amount of the judgment. The accounting officers of the commonwealth and the court adopt a like construction of the statute, but, differing in their views of the evidence, differ in results. The officers of the defendant corporation, putting a wholly different construction on the statute, largely differ from both as to the fact. The defendant appraised its capital stock as of no value whatever. The commonwealth appraises it at $34,480,577.70. The court below appraises it at less than half that amount. The main dispute between the commonwealth and defendant is as to the construction of the act of 1891.

It may be conceded at once that the legislative intent to levy the higher amount must be express, or result from necessary implication; for, if in a tax law the intent is doubtful, it does not exist.

273 The title of the act declares the purpose to be to tax "all the property of corporations, limited partnerships and joint stock associations having capital stock, at the rate of five mills on each dollar of its actual value." Could legislative language be plainer? All the property of corporations is to be taxed at the rate of five mills on each dollar of its actual value. The words "having capital stock" are used to distinguish such corporations from beneficial, religious and other corporations having membership, but not capital stock representing the respective interests of members in the corporate property. Then, preamble 6 of the act further declares it to be the purpose to tax "all corporations, limited partnerships and joint stock associations having capital stock, at a fixed rate of five mills upon each dollar of the actual value of their whole capital stock, including as well their bonds, mortgages and moneys at interest, as their franchises and property of other kinds. In Com. *v.* Standard Oil Co., 101 Pa., St. 119, speaking by Paxson, *J.*, this court held: "It has been repeatedly decided, and is settled law, that a tax upon the capital stock of a company is a tax upon its property and assets." Then in Appeal of Fox, 112 Pa., St. 354, 4 Atl., 155, it is said: "The capital stock is nothing—a myth; a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock. Hence it is that the courts have long since declared that a tax upon the capital stock of a corporation is a tax upon the assets and property of such corporation." In Com. *v.* Delaware, S. & S. R. Co., 165 Pa., St. 44; 30 Atl., 522, 523 (opinion by McCollum, *J.*), we said: "In ascertaining the actual value of the capital stock, was it proper to take into consideration, affecting the value, the

274 franchise of the company? We think this question is affirmatively answered by the act of June 8, 1891, under which the valuation was made. The capital stock represents the franchises as well as other property of the company. In the sixth preamble of the act there appears a plain legislative purpose to include the franchises in fixing the value of the stock, and this is in harmony with the title and provisions in respect to the taxation of it." There are other cases to the same effect. The statute having thus, in express terms, declared the subject of taxation to be all the property of corporations having capital stock, and the settled interpretation by this court of a tax on capital stock of a corporation being that it is a tax upon all the property of the corporation, it is clear the learned judge of the court below committed no error in the first sentence of his conclusion of law, thus: "A tax on the capital stock of a corporation is a tax on its property and assets, including its franchises."

The main contention, however, is over the last part of the conclusions, as follows: "The question of the actual value in cash of the capital stock is a question of fact, which must be determined by considering the value of the defendant's tangible property and assets

of every kind, including its bonds, mortgages and moneys at interest, and its franchises and privileges, and the amount of the incumbrances on its property and franchises is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined." The contention of the appellant's counsel in substance is that, to ascertain the actual value, there should be deducted the amount of the corporation indebtedness from the aggregate fairly appraised value of the corporate property. The remainder would then represent the actual value of the capital stock.

This would in many cases hide the tangible property, and
275 turn the commonwealth over to the assessment and collection of its revenues from nothing; in the face, too, of what we have repeatedly decided—that a tax upon the capital stock of a company is a tax upon its property and assets. The legislature might have so worded the statute that such result as that contended for would follow, namely, that solvent corporations should pay taxes, and insolvent ones not; but, with our decisions in 1882 and 1886, and the declared law long preceding them, that "capital stock" in taxing statutes, meant the property and assets of the corporation, before them, they declared, in the act of 1891, precisely to the contrary. In fact, from the wording of preamble 6 of the act of 1891, we do not doubt that, at least, the framer of the act was familiar with the opinion of this court in Com. *vs.* Standard Oil Co., *supra*.

In supporting their arguments on each side, counsel have given undue significance to the indebtedness of the corporation. Strictly speaking, in view of the purpose of this statute, the debt is almost as much of a myth as the certificate of capital stock. The declared purpose is to tax the capital stock by ascertaining its value in view of the tangible assets of corporations, what was owing to them, the value of their franchises, and the rights and privileges they possessed under their grants. The commonwealth no more sought, by the act of 1891, to ascertain and tax the net assets of these artificial beings, than, by the usual tax laws, she seeks to tax the net assets of natural ones. In the latter case she rarely inquires as to what the taxpayer owes. She does ask what he is possessed of. It is only when the attempt is made to tax his creditor that, incidentally, what is owing by the debtor becomes of interest to the taxing power. We have no hesitation in holding that it would be manifest
276 error to adopt the amount of the debt as a part of the value of the corporate property; and it would be just as erroneous to hold that it should be deducted from the aggregate value of the property, and thereby withdraw tangible property to that extent from taxation. In either case it would be dragging in a fact of but slight consequence, and making it the prominent and controlling one in the issue, in the face of the declared purpose of the statute to tax the actual value of the capital stock, as indicated by the franchise and property. In the case of Com. *v.* Standard Oil Co., *supra*, Paxson, *J.*, in referring to the fact that the certificates of stock were in possession of the owner in Ohio, where the corporation was domiciled, says: "It follows, necessarily, that shares of stock in a Pennsylvania corporation, held by a corporation or individual domi-

ciled in another state, cannot be taxed here. One sufficient reason is that there is nothing here to tax. The capital stock—that is, the property and assets—are here, and are taxed." In other words, the shares themselves, which represent the owner's interest less debts, have so little to do with the subject of taxation—the capital stock—that it is immaterial where they are held, or who holds them. The property and assets—the capital stock—being in this state, that, alone, is within reach of the taxing power. Now, what change is worked in this tangible property by subjecting it to a debt of the owner? In the case cited, the certificates and owner were both in a foreign jurisdiction; yet, the property and franchise being within the jurisdiction, the authority of the commonwealth to tax the capital stock, on ascertaining its value from what was within the jurisdiction, was upheld. If he cannot withdraw his tangible
277 property from taxation, by taking his title to it, and person, outside state boundaries, how can he do so by voluntarily pledging it for a debt? That the owner subjects it to a debt in no way changes the relation of the commonwealth to it as a subject of taxation. It constitutes precisely the same capital stock as before. His relation to his own property has been somewhat changed, for, by the mortgage debt, he has admitted others to a share of the income, and has given them a lien for their debt. His title, however, remains just the same as if the owner of the legal title to land had placed a mortgage upon it. All the indications of ownership, the possession of the deed, and dominion over the property, continue, as if no debt had been created. As is said by our Brother Williams in Com. *v.* Fall Brook Coal Co., 156 Pa., St. 488, 26 Atl. 1071, speaking of the power of the commonwealth to tax the land as well as the mortgage upon it: "In that case there are two distinct subjects of taxation, each of which is made taxable by an express provision of the law. The farm is taxable as land, against whomsoever may be the owner, without regard to the incumbrances upon it. * * * The land is taxable once to the owner. The money is taxed once to its owner. They are distinctly different taxpayers, and pay taxes upon distinctly different subjects of taxation." The debt as an item of evidence, may have bearing in fixing the value of the franchise; but from the nature of the property, and the character of the debt, its affirmative weight in establishing value is significant; for of all forms of debt, as an indication of actual value of the thing pledged, the ordinary railroad mortgage is the most unreliable, and especially is this the case when the mortgage is executed to carry out a reorganization plan of security holders in a bank-
278 rupt road. Without adverting further to the history of this road it is sufficient to say that its mortgage debt is always far in excess of any possible value of the property. We do not know just what prominence was given by the learned Judge of the court below to the amount of indebtedness in reducing the actual value of the capital stock. He says, in the conclusion of law already quoted, that the question of actual value in cash of the capital stock is one of fact, to be determined by considering the value of defendant's tangible property, etc. "And the amount of incumbrances on its

property and franchises is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined." That he gave no weight whatever to it, even as affirmative evidence tending to establish the value of the stock as claimed by the commonwealth, is clear. That he treated it as a relevant fact favoring defendant, and tending to reduce the actual value, although not to be specifically deducted, is also clear; and in this he was correct. That a large debt, one largely out of proportion to the value of the property, secured by mortgage, with interest payable semi-annually, constituting what is called a "fixed charge," seriously depreciates the actual value of the property, cannot be questioned. Default in any payment of interest puts the property in peril of seizure and sale to satisfy not only the overdue interest, but the whole debt. A property heavily incumbered, as is this one, is liable to pass into the hands of the mortgage creditors at any time. But counsel for defendant planted himself on a demand for an absolute deduction of the whole amount from the appraised value, and made no request for a specific finding of fact in this particular. It was not, therefore, incumbent on the court to specify in the
279 finding exactly what weight was given to a particular fact; and we assume that it had all the effect that it was entitled to.

The argument that different methods were adopted by the commonwealth's officers in ascertaining the actual value of the capital stock of corporations, and therefore there has been want of uniformity and a discrimination, is not well founded. As the learned Judge of the court below shows, prior to the act of 1891 the basis of taxation value, by the taxing acts, was the net earnings; but the latter act declares that the capital stock shall be appraised "at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings, or by the amount of profit made, and either declared in dividends or carried into surplus or sinking fund." A minimum appraisement is here fixed for solvent corporations. In most cases, doubtless, the corporation officers and the commonwealth, in estimating the actual value of a sol-ent, well-managed road, would adopt it—and properly, too—as a fair basis in estimating the actual value of the capital stock. But the act of 1891 was intended to reach also the bankrupt road, which may have the same mileage, the same traffic, and the same privileges as the solvent one. The state conferred upon it the right of eminent domain, for location and extension of branches or feeders, as well as for necessary improvements. Being constructed, it now has the right, under the protection of the laws, to operate it in carrying freight and passengers. As the same rule for a fair estimate of the actual value of the capital stock cannot be adopted as in case of the solvent roads, and the commonwealth's officers being dissatisfied with the corpor-
280 ate officers' appraisement, they proceed, under the authority expressly given, to make an appraisement, upon the facts in the report, and other information within their possession. Upon appeal, the court differs from them in their inferences, and reduces largely the amount subject to tax. On the number of miles of road

in Pennsylvania—about 127 of a total of 430—with a capital stock of the actual value, as a whole of $15,000,000, the court fixes the actual value of the capital stock of the 127 miles in this state at only a little over $3,500,000. The method of determining the proportion of stock taxable in Pennsylvania has been repeatedly decided to be the correct one. The figures, certainly, do not indicate an excessive valuation of the capital stock of 127 miles of railroad. As between the defendant and solvent roads of the same physical character, there is no discrimination as concerns results, in favor of the solvent ones; for the latter are rated as high as $40 to $52 per share, while this one is less than one-third that amount. The actual value being a pure question of fact, appellant has no standing to complain of discrimination in methods, so long as its stock is not assessed in excess of that value. It may be that the Reading and some other corporations are taxed on less than the actual value of their capital stock. If so, the commonwealth is not here appealing, and consequently it is not our business to inquire into the matter. We can only say that, after a most careful examination of the whole case, we find neither error of fact nor law in the judgment of the court below, and it is therefore affirmed.

MITCHELL, *J.*:

I dissent in this and kindred cases, known as the "Capital Stock Cases," because I am of opinion that the decision is founded on a fundamental error, in confusing a tax on the property of
281 the corporation with the tax on the property of the individual shareholder therein, which is what the statute imposes. The subject matter of taxation under the act of June 8, 1891, is capital stock, *eo nomine*, independently and without reference to the property which it represents. It is to be taxed at its "actual value in cash, not less however than the average price which said stock sold for during said year," etc. The officers of the corporation concerned are required to make sworn returns under seventeen specific heads, all of which tend to show the value of the stock as such, and not a single one of which refers directly or indirectly to the value of the property which such stock represents. The value of the capital stock in the hands of the shareholders is the value of their resulting interest in the property of the corporation subject to its debts and incumbrances, in view of the use to which it may be put under its corporate franchises, etc.; and the value of such resulting interest is the true subject of tax under the statute. As construed by this decision, the tax is put on the value of the property of the corporation, without regard to the value of the capital stock in the hands of the shareholders. This is a total change in the subject of taxation, without any warrant in the statute, and against its plain language and intent.

Green and Williams, JJ., join in this dissent.

282

Exhibit G.

New York Central & Hudson River Railroad Co.

New York, 6–5–1905.

Dear Sir: Below please find movements of N. Y. C. Car number 90350 from Weehawken to San Francisco.

C. H. Ewings,
Car Acc't.

Movements.	Date. Month.	Day.	Year.	L. or E. Time.	Train.	Con.
Rec'd from				M.	Mo. Pacific.	
From W'kn.	3	2	04	M.	C. R. I. & P.	
To Susp. Bridge	3	4		M.	Mo. Pac. 7-2	
To M. C.	3	4		MM.	C. B. & Q. 7-11	
To Chicago Belt	3	8		M.	C. G. W. 7-11	
To C. G. W.	3	9		M.	Wabash 7-12	
To K. C. C. B.	3	13		M.	M. C. 7-23	
To C. B. Q. & Mo. Pac.	3	13		M.	N. Y. C. 7-31	
To D. & R. G.	3	17		M.		
To R. G. W.	3	18		M.		
To So. Pacific	3	19		M.		
To R. G. W.	4	10		M.		
To D. & R. G.	4	16		M.		
To Mo. Pac.	5	2		M.		
To D. & R. G.	5	3		M.		
Del'd to Mo. Pac.	5	19				

New York Central & Hudson River Railroad Co.

New York, 6–5–1905.

Dear Sir: Below please find movements of N. Y. C. Car number 63379 from Weehawken to Minneapolis.

C. H. Ewings,
Car Acc't.

Movements.	Date. Month.	Day.	Year.	L. or E. Time.	Train.	Con.
Rec'd from				M.	To Erie 4-27	
From W'kn.	3	11	04	M.	N.Y.C.& St.L. 5-18	
To Susp. Bridge	3	14		M.		
To Wabash	3	14		M.		
To C. Belt	3	18		M.		
To Wisc. Cent.	"	"		M.		
To Gt. North.	3	22		M.		
To C. St. P. M. & O.	3	23		M.		
To Gt. North.	3	25		M.		
To Wisc. Cent.	3	28		M.		
To Gt. North.	3	28		M.		
To M. & W.	3	29		M.		
To Gt. North.	—			M.		
To Wisc. Cent.	3	31		M.		
To E. J. & E.	4	3				
Del'd to N. Y. C. & St. L.	4	14				

283 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car number 11645 from Weehawken to Victoria, B. C.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	MONTH.	DAY.	YEAR.		L. OR E. TIME.	TRAIN.	CON.
Rec'd from				M—To Erie	6	22	
From W'kn.	3	12	04	M—P. & L. E.	6	23	
To Ogdensburgh ...	3	15		M—Erie	7	3	
To C. P.	3	15		M—L. S. & M. S.	—	—	
To N. Y. C.	4	1		M—C. M. & St. P.	7	13	
To C. North.	4	26		M—L. S. & M. S.	7	21	
To M. C.	4	26		M—C. R. & I. P.	7	24	
To W. & L. E.	5	3		M—C. T. Transfer	7	25	
To C. H. & D.	5	3		M—C. R. & I.	8	23	
To C. & O.	5	6		M—L. S. & M. S.	—	—	
To C. H. & D.	5	27		M—P. R. R.	8	8	
To L. E. & W.	6	11		M—L. S. & M. S.	8	29	
To L. S. & M. S. ...	6	15		M			
To L. E. & W.	6	16		M			
To L. S. & M. S. ...	6	16					
Del'd to							

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car number 46260 from Weehawken to Medicine Lodge, Kas.

C. H. EWING, Car Acc't.

MOVEMENTS.	MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'kn.	3	15	04		M		
To Susp. Bridge	3	20			M		
To Wabash	3	21			M		
To C. Belt	3	24			M		
To A. T. & S. F.	3	24			M		
To M. C.	3	26			M		
To Chic. Junct.	3	26			M		
To Wabash	3	27			M		
To Chic. Jct.	3	29			M		
To Mich. Cent.	3	29			M		
To N. Y. C.	4	5			M		
To					M		
From					M		
To					M		
Del'd					M		

284 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car numbered 64397 from Weehawken to Hamilton, Ont.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E. TIME.	TRAIN.	CON.
Rec'd from				M. L. S. & M. S.		
From W'kn.	3	17	04	M. C. N. W.	6	14
To Ogdensburgh	3	21		M. L. S. & M. S.	6	21
To C. P.	3	21		M. E. J. & E.	6	23
To D. S. S. & A.	3	25		M. L. S. & M. S.	6	29
To M. C.	5	3		M. L. V.	7	2
To G. T.	5	12		M. W. & N. B.	7	5
To M. C.	5	17		M. P. & R.	7	16
To L. S. & M. S.	5	22		M. N. Y. C.	7	18
To M. C.	5	23		M.		
To L. S. & M. S.	5	27		M.		
To M. C.	5	27		M.		
To L. S. & M. S.	5	28		M		
To Erie	6	1		M.		
To P. & L. E.	6	2		M.		
Del'd to Erie	6	10				

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car number 24241 from Weehawken to Winnipeg.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'kn.	3	18	04		M		
To Ogdensburgh	3	22			M		
To C. P.	3	25			M		
To N. Y. C.	4	7			M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to					M		

285 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car number 64887 from Weehawken to Minneapolis.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'kn.	3	21	04		M		
To Ogdensburgh	3	25			M		
To C. P.	3	26			M		
To N. Y. C.	4	11			M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to							

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car number 65224 from Weehawken to Duluth.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'kn.	3	27	04		M		
To Ogdensburgh	3	31			M		
To C. P.	4	2			M		
To Hull Electric Co.	4	9			M		
To C. P.	4	2			M		
To N. Y. C.	4	22			M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to							

286 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Stipulation under Sections 3301 and 1353 of the Code of Civil Procedure.

It is hereby stipulated, under Section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the petition for writ of certiorari, order of issuance of writ, writ, and return to writ, and certification thereof, as required by Section 1353 of the Code of Civil Procedure, is hereby waived.

Dated New York, October 21, 1905.

IRA A. PLACE,
Attorney for Relator.
JULIUS M. MAYER,
Attorney-General,
Attorney for Respondent.

287 *Order of Appellate Division.*

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department of said State, at the Appellate Division Court Room, in the City of Albany, commencing on the 14th day of November, 1905.

Present: Hon. Charles E. Parker, Presiding Justice. Walter Lloyd Smith, Emory A. Chase, Alden Chester, John M. Kellogg, Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator,

vs.

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Tax of 1903.

This case having been brought on for hearing and argument upon the writ of certiorari and return and the papers upon which the writ was granted and having been submitted on printed brief and argument by Ira A. Place, Esq., of counsel for the relator, and by
288 Horace McGuire, Esq., Deputy Attorney General, of counsel for the respondent,

Now, on motion of Julius M. Mayer, Attorney General, attorney for the respondent,

It is ordered that the determination of the Comptroller be and the same here- is unanimously confirmed, with fifty dollars costs and disbursements.

JOSEPH H. HOLLANDS, *Clerk.*

[L. S.] A copy.
JOSEPH H. HOLLANDS.

SIR: Take notice, that the within is a copy of an order duly filed and entered in the office of the Clerk of Albany County on the 5th day of December, 1905.

Yours, etc.,

JULIUS M. MAYER,
Attorney General, Attorney for Respondent.

To Ira A. Place, Attorney for Relator.

289 *Affidavit of No Opinion.*

Supreme Court, Appellate Division—Third Department.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Tax of 1903.

STATE AND COUNTY OF NEW YORK, *ss:*

Thomas Emery, being duly sworn, says: That he is an attorney and counselor at law, and associate counsel for the relator The New York Central and Hudson River Railroad Company in the above-entitled action.

That no opinion was handed down by the Appellate Division herein.

THOMAS EMERY.

Sworn to before me this 6th day of December, 1905.

GEO. T. BROWN,
Notary Public, Westchester County.

Certificate filed in New York County.

290 *Relator's Notice of Appeal to Court of Appeals.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Notice of Appeal to Court of Appeals.

Tax of 1903.

SIRS: Please take notice that the relator in the above-entitled action hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Department, entered herein in the office of the Clerk of the County of Albany, on the 5th day of December, 1905, and from each and every part of said order.

Dated New York, December 5th, 1905.

Yours, &c.,
IRA A. PLACE,
Attorney for Relator, Room 417 Grand Central Station, Borough of Manhattan, New York City, N. Y.

To Julius M. Mayer, Esq., Attorney for Respondent, Capitol, Albany, N. Y., and Clerk of the County of Albany, Albany, N. Y.

291 *Stipulation.*

In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Stipulation Under Sections 3301 *and* 1353 *of the Code of Civil Procedure.*

Tax of 1903.

It is hereby stipulated, under Section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the notice of appeal, the order appealed from and the papers upon which the Court below acted in making said order, on file in the office of the Clerk of Albany County, and certification thereof, as required by Section 1353 of the Code of Civil Procedure, is hereby waived.

Dated Borough of Manhattan, New York City, December 6th, 1905.

IRA A. PLACE,
Attorney for Appellant.
JULIUS M. MAYER,
Attorney-General, Attorney for Respondent.

292 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the capitol in the city of Albany, on the 23rd day of January, in the year of our Lord one thousand nine hundred and six before the judges of said court.

Witness the Honorable Edgar M. Cullen, chief judge presiding.
W. H. SHANKLAND, *Clerk.*

Amended Remittitur, January 31st, 1906.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Tax of 1903.

Be it remembered, that on the 15th day of December in the year of our Lord one thousand nine hundred and five, The New York Central and Hudson River Railroad Company, the appellant in this proceeding, came here into the Court of Appeals, by Ira A. Place, its attorney, and filed in the said court a notice of appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department, and Otto Kelsey, as Comptroller of the State of New York, the respondent in said proceeding, afterwards appeared in said Court of Appeals, by Julius M. Mayer, Attorney-General and attorney for said respondent, which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon the said cause having been submitted to the
293 said Court of Appeals upon the printed briefs of counsel on behalf of the said respective parties, and after due deliberation thereon, the court did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from in this proceeding be and the same hereby is in all things affirmed with costs. The relator having contended herein that the statute if it purport to authorize the said tax, and the authority exercised under the Statute in and by the imposition and exaction of the said tax are and each thereof is violative of the Constitution of the United States in the several particulars following; the court hold and adjudge that the statute under and in pursuance of which the tax herein complained of is imposed and exacted does not, and the authority exercised under this Statute in and by the imposition and exaction of the said tax does not, (1) offend against the commerce clause Article 1 Section 8 of the Constitution of the United States; (2) nor contravene the provisions of Article 1 Section 10 thereof forbidding impairment of the obligations of contracts; (3) nor offend against Article 4 Section 1

thereof requiring that full faith and credit shall be given in each State to the public acts of every other State; (4) nor offend against the provisions of the fourteenth amendment thereof forbidding the State to deprive any person of property without due process of law, and forbidding the State to deny to any person within its jurisdiction the equal protection of the laws.

And it was further ordered that the record aforesaid and the proceedings in this court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Whereupon it is considered that the said order be in all things affirmed with costs as aforesaid and stand in full force strength and effect.

294 And hereupon as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the justices thereof &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, *January* 31*st*, 1906.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said proceeding in the Court of Appeals with the papers originally filed therein and attached thereto.

[Seal Court of Appeals State of New York.]

W. H. SHANKLAND, *Clerk.*

295 *Memorandum.*

Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant,

vs.

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Argued January 9th, 1906; decided January 23, 1906.

Ira A. Place, for appellant.
Horace McGuire, Deputy Atty. General, for respondent.

Three appeals from determinations of the Appellate Division, third department, which unanimously affirmed the determinations

of the Comptroller of the State of New York in assessing the relator for its annual franchise tax for the years 1902, 1903 and 1904.

The orders in all three cases affirmed, with costs.

No opinion.

Concur: Cullen, Ch. J., O'Brien, Haight, Vann, Werner, Willard Bartlett and Hiscock, JJ.

296 [Endorsed:] In the Court of Appeals of the State of New York. The People of the State of New York, Upon the Relation of The New York Central and Hudson River Railroad Company, Appellant, *vs.* Otto Kelsey, as Comptroller of the State of New York, Respondent. Memorandum. Tax of 1903.

297 *Assignment of Errors.*

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiff in Error,

against

OTTO KELSEY, as Comptroller of the State of New York, Defendant in Error.

(Tax of 1903.)

To the Honorable Justices of the Supreme Court of the United States:

Come now the said petitioners, plaintiffs in error, and respectfully show to the Court that there is in the said record and proceedings manifest error upon which they will rely in and for their prosecution of the writ of error in the above entitled cause, to wit:

I. That the said Supreme Court of the State of New York erred in rendering, and the said Court of Appeals of the State of New York erred in affirming the final order and judgment wherein and whereby the provisions of section 182 of the Tax Law of the State of New York, and the authority exercised thereunder by the Comptroller of the State of New York, were held valid in and for franchise taxation of and upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, mail, baggage and express cars which were in obedience to laws of the United States and in due course of business delivered by relator to and employed and used by other common carrier railroad cor-
298 porations outside of the State of New York in the through carriage of persons and property starting or consigned from the State of New York, Massachusetts, New Jersey and Pennsylvania, respectively, and destined to other states, and vice versa, and in transportation of persons and property between points in respective states other than and over routes wholly outside of the State of New York, and that such franchise tax did not offend against the commerce clause, Article 1, Section 8 of the Constitution of the United States.

II. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, baggage, mail and express cars, which in obedience to the requirements of the United States statutes, and in the due process of business were transferred and surrendered by said relator to the possession of and used successively and interchangeably by other common carrier railroad corporations outside of the State of New York in the through carrying of persons and property between points in respective states other than New York State, and over routes outside of that state, all under authority of and in the exercise of franchises granted to them respectively by respective states other than the State of New York, and that the franchise tax thus computed and imposed did not impair the obligations of the contracts, arising upon, inhering in and pertaining to the grant, acceptance and use of the respective franchises whereunder the said cars of relator were thus operated and used outside of the State of New York by common carrier railroad corporations foreign to said
299 State of New York, and hence was not repugnant to Article 1, Section 10 of the Constitution of the United States.

III. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, baggage, mail and express cars, which in the course of transportation business and in obedience to the requirements of the United States statutes, were by the said relator delivered to corporations foreign to the State of New York, and by such foreign corporations employed and used upon railroads operated by them respectively, in respective states other than New York State in the through carrying of persons and property starting or consigned from points in New York, Massachusetts, New Jersey or Pennsylvania, respectively, and destined to points outside of such respective state, and vice versa, and between points foreign to said several states via and over lines of railroad situate without the State of New York, all in the exercise of and under the authority of franchises granted by the respective states wherein the said operations were so carried on and conducted, and that such franchise tax did not impair the obligations of the contracts pertaining to such use of relator's cars by other corporations, and hence was not repugnant to Article 1, Section 10 of the Constitution of the United States.

IV. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for and the exercise thereunder of said authority the valid imposition of franchise taxation in and by the State of New York upon the basis of the capital of relator invested and employed in the average number of
300 its cars which, in obedience to the requirements of the statutes of the United States, were delivered by relator to transportation corporations foreign to the State of New York, and operated and used by them wholly within states other than New York State, under authority of, and in the exercise of franchises granted by such other

states, respectively, to corporations created by them, and that the said statute and the said tax imposed under its authority, did not operate to deprive relator of its property or property rights without due process of law, and did not deprive relator of the equal protection of the laws and hence did not contravene the provisions of the fourteenth amendment to the Constitution of the United States.

V. That the said Courts, respectively, erred in holding and deciding that franchise taxation prescribed by, and imposed by the said Comptroller of the State of New York under the supposed authority of, said statute, upon the basis of relator's capital invested in the average number of its cars by it operated and used in the States of Massachusetts, New Jersey and Pennsylvania, respectively, in the transportation of persons and property between points within either of the said respective states, and between points within and points without such respective State, and between points of starting or shipment and points of destination without via and over routes in part within one or more of the said respective states, all under authority of and in the exercise of franchises granted by those states, respectively, to corporations created thereby and domiciled therein, and by the latter leased to the said relator, all subject unto the regulation of and under the authority and protection of the public acts of such respective state, did not burden or regulate interstate or foreign commerce, and hence did not offend against or contravene the provisions of
301 the commerce clause, Article 1, Section 8 of the Constitution of the United States; did not impair the obligations of contracts arising upon or inhering such obedience to the commerce laws of the United States, and therein did not contravene Article 1, Section 10 of the Constitution of the United States; and did not deny or refuse full faith and credit to the public acts of such other state and therein did not contravene Article 4, Section 1 of the Constitution of the United States.

VI. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation in and by the State of New York upon the basis of the capital of relator invested and employed in the average number of its cars operated and used by it in the States of Massachusetts, New Jersey and Pennsylvania in the exercise of franchises granted by those states, respectively, and leased or remised by the grantees thereof to the said relator, and exercised by it in the carrying of commerce between points respectively within, and between points within and points without those respective states, and that therein and thereby the said statute did not impose burden upon or regulation of interstate and foreign commerce and did not impair the obligations of contracts pertaining to interstate and foreign commerce, and hence did not offend against the provisions of either Article 1, Section 8, or Article 1, Section 10 of the Constitution of the United States.

VII. That the said Court, respectively, erred in holding and deciding that franchise taxation imposed by the said Comptroller of the State of New York under the supposed authority of said statute, upon the basis of the capital of said relator invested
302 in the average number of its cars by it operated and used in the States of Massachusetts, New Jersey and Pennsylvania,

respectively in the exercise of franchises granted by those states, respectively, to corporations created thereby and domiciled therein, and by them leased to relator and by it exercised in commerce local to said respective states, as also in commerce between those respective states and other states, did not impair the obligations of the contracts inhering in, arising upon and pertaining to the grant, acceptance and use of the franchises granted by the said respective states, within their domain, respectively, and hence did not therein offend against the provisions of Article 1, Section 10 of the Constitution of the United States.

VIII. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its cars used wholly outside of the State of New York, in the operation of railroads situate in other states, owned by corporations created by and domiciled within such other respective states, and leased to and operated by the said relator under authority of the franchises of its said respective lessors, granted to them by the said states, respectively, and that such franchise tax did not impair the obligations of the said contracts of lease, and hence was not therein repugnant to Article 1, Section 10 of the Constitution of the United States.

IX. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for and the exercise thereunder of said authority the valid imposition of franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight,
303 baggage, mail and express cars employed and used by relator in the States of Massachusetts, New Jersey and Pennsylvania, respectively, upon lines of railroad situate in and built and owned by corporations chartered by and domiciled in said respective states, and leased by such corporations to and operated by the said relator, in the carrying of state and interstate commerce under and subject unto the franchise granted and regulation prescribed by such respective state wherein the said road is situate, and that such franchise tax did not transcend the territory and power of the jurisdiction of the State of New York and of its said Comptroller and did not deprive relator of its property or property rights without due process of law, and did not deny to relator the equal protection of the laws, and hence did not therein contravene the fourteenth amendment of the Constitution of the United States.

X. That the said Courts, respectively, erred in holding and deciding the said statute of the State of New York to be valid authority for, and the said authority of the Comptroller of the State of New York exercised thereunder to constitute valid imposition of, the said franchise tax imposed and computed upon the basis of the capital of the said relator invested and employed in the average number of its cars, which, having in obedience to the requirements of the laws of the United States passed out of the State of New York and out of the possession, custody and control of the said relator, were operated and used by railroad corporations created by other states upon their railroads there situate, under authority of franchises granted by such

other states, respectively, in common carrier transportation local to said respective states and between those and other states, and that such franchise tax thus computed and imposed did not con-
304 stitute a burden upon or regulation of commerce among the several states, and did not impair the obligations of the contracts under which in obedience to the laws of the United States the said relator transferred and surrendered, and the said respective foreign corporations in turn directly or remotely acquired possession and custody of and used the said cars of said relator, and did not impair the obligations of the contracts inhering in, arising upon and incident to the grant, acceptance and use in such other states of the franchises granted by them, respectively, and did not derogate from the dignity of such other respective states or refuse full faith and credit to the public acts thereof, or otherwise transcend the territory or power of the jurisdiction of the State of New York or of its said Comptroller, and hence that the said franchise tax thus computed and imposed did not offend against and was not violative of or repugnant to either Article 1, Section 8, or Article 1, Section 10, Article 4, Section 1, or the fourteenth amendment of the Constitution of the United States.

XI. That the said Courts, respectively, erred in holding and deciding the said statute of the State of New York to be valid authority for, and the said authority of the Comptroller of the State of New York exercised thereunder to constitute valid imposition of the said franchise tax computed and imposed upon the basis of the capital of the said relator invested and employed in the average number of its cars operated and used in the States of Massachusetts, New Jersey and Pennsylvania, respectively, upon lines of railroad situate therein, built, maintained and operated under authority of franchises granted by those respective states to and accepted by corporations created thereby, and domiciled therein, and under leases or grants of trackage rights of railroad and accompanying
305 franchise demised or let by the said owning corporations to the said relator, and thus operated and used in and about common carrier transportation local to the said states of Massachusetts, New Jersey and Pennsylvania, respectively, and between those respective states and other states of the United States and dominions foreign to the United States, and that such franchise tax thus computed and imposed did not constitute a burden upon or regulation of commerce among the several states or foreign commerce, or commerce within and domestic to such respective state, and did not impair the obligations of the contracts inhering in, arising upon and incident to the grant, acceptance and use in such respective States of Massachusetts, New Jersey and Pennsylvania of the franchises granted by them respectively, or of the contracts of lease and agreements of and for trackage rights whereby and whereunder the said owning corporations granted, demised and let the said property and property rights and franchises to relator and relator thus operated in the said respective states under authority thereof and of said franchises, and did not derogate from the dignity of such respective state or deny or refuse full faith and credit to the public

acts of such other respective state, or thus or otherwise transcend the territory or power of the jurisdiction of the State of New York or of its said Comptroller, and hence that the said franchise tax thus computed and imposed did not contravene or offend against and was not violative of or repugnant to either Article 1, Section 8, or Article 1, Section 10, Article 4, Section 1, or the fourteenth amendment of the Constitution of the United States.

XII. That the said Courts, respectively, erred in so holding and deciding as therein and thereby to uphold and sustain the
306 validity of the said statutory provisions and of the authority of the said Comptroller of the State of New York exercised thereunder in the said computation and imposition of the said franchise tax as not constituting a burden upon or regulation of commerce domestic to and within states other than the State of New York, as not constituting a burden upon or regulation of commerce among the several states or with foreign countries, as not impairing the obligations of contracts arising upon and pertaining to commerce within and domestic to states other than the State of New York, as not impairing the obligations of contracts arising upon or pertaining to commerce among the several states and with foreign countries, as not impairing the obligations of contracts arising upon and pertaining to the grant and acceptance and lease of franchises by and the exercise and use thereof within states other than the State of New York, as not derogatory to the dignity of a sister state, as not denying full faith and credit to the public acts of such other state, as not transcending the territory or power of the jurisdiction of the State of New York or of its said Comptroller, and as not depriving the said relator of its property or property rights without due process of law, and as not depriving relator of the equal protection of the laws, and hence denying to the said relator the relief, order and decree herein prayed for, and in rendering judgment against them for costs and disbursements in the said cause and proceeding.

XIII. That the said Courts, respectively, erred in holding and deciding in favor of the validity of the said statute of the State of New York, and the authority of the said Comptroller of the State
307 of New York by him exercised thereunder, and consequent thereupon that the said petitioners, plaintiffs in error, were disentitled to have and maintain their said cause and proceeding and to have the relief, order and decree therein and thereby prayed for.

XIV. That the said Courts, respectively, erred in holding and deciding in favor of the validity of the said statute of the State of New York and of the said authority exercised thereunder, whereby the said franchise tax was in manner aforesaid computed and imposed, as not repugnant to the Constitution of the United States, and consequent thereupon denying to said relator the relief, order and decree prayed for in its complaint in said cause.

XV. That the said Courts, respectively, erred in that their said respective final order and judgment were for and in favor of the said respondent, defendant in error, as Comptroller of the State of New York, when the same should have been for and in favor of the said petitioners.

The said petitioners, plaintiffs in error, pray judgment that the said final order and judgment aforesaid be in all things reversed, set aside and held for naught, and the said relator may be restored to all things which it has lost by occasion thereof.

IRA A. PLACE,
Attorney for Plaintiffs in Error.

THOMAS EMERY,
Of Counsel.

308 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Assignment of Errors. (Tax of 1903.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y.

309 *Petition for Writ of Error to the Court of Appeals of the State of New York.*

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiffs in Error,

against

OTTO KELSEY, as Comptroller of the State of New York, Defendant in Error.

(Tax of 1903.)

To the Honorable Justices of the Supreme Court of the United States.

Come now the said petitioners The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company by their attorney, and as and by way of complaint of and against the said Otto Kelsey, as Comptroller of the State of New York, respondent, respectfully show to the Court:

That the said relator, The New York Central and Hudson River Railroad Company, was during all of the times mentioned in the record herein and is a domestic corporation of the State of New York, organized under the laws of and domiciled within that state, engaged in the business of a common carrier of persons and property between points respectively within that state, and between points respectively within either of the respective States of Massachusetts, New Jersey and Pennsylvania, and between points in either of the said respective states and points in either of the others thereof, and between
310 points in either of said states and points in other states and foreign countries, and between points in respective states other than the above, via and over routes extending through and over portions of one or more of the said respectively named states.

That by provision of the Tax Law of the State of New York, Section 180, the tax or license fee of and for domestic corporation organization, existence and capacity is imposed, exacted and paid once for all at the threshold of the vesting of corporate power; Section 182 thereof provides imposition of an annual franchise tax for and upon the exercise of domestic corporation franchises to be computed as therein provided upon the basis of the amount of corporate capital employed in said state within the tax year; and, Section 184 thereof provides imposition of an additional annual franchise tax to be computed upon the basis of the amount of corporate gross earnings therein within the tax year.

That during the year ending October 31, 1903, for and in respect of which the tax here in question was imposed and exacted, the said relator carried on its said business of a common carrier of persons and property in and by the operation of engines, cars and trains upon and over its owned and leased lines of railroad and lines of railroad upon and over which it had trackage rights, respectively, within the State of New York, and upon and over leased lines of railroad and lines of railroad upon and over which it had trackage rights, respectively, within the respective States of Massachusetts, New Jersey and Pensylvania, upon all whereof it thus carried persons and property locally between points within either of the respective states wherein portions of its operated lines of railroad were situate,
311 and between points in either of those respective states and points in other states.

That in and about the carrying on of said transportation business by the said relator large numbers of its cars, though composed of frequently and constantly changing individual cars, passed into or out of the said respective States of New York, Massachusetts, New Jersey and Pennsylvania in such wise that at all times a large average number, to wit, many hundreds of the cars of said relator were continuously situate, employed and operated in the States of Massachusetts, New Jersey and Pennsylvania, respectively, upon and over railroads there situate, and in so doing were thus operated in the right of and under authority of the franchises in that behalf granted by those respective states and subject unto the burdens imposed and regulations prescribed in and by the public acts, laws, rules and ordinances of the respective state, and political subdivision thereof, wherein the said portion of road was situate and the said transportation service performed.

That the major part of the said relator's said transportation business consisted of such transportation by it upon and over portions of its said operated lines of road of so much of through carriage of persons and property starting or consigned from points outside of some one of the respective States of New York, Massachusetts, New Jersey and Pennsylvania and destined to points within some one of said respective states, or vice versa, and persons and property starting or consigned from points respectively without either of said states, passing en route through some one or more thereof, and destined to points respectively without either thereof.

That inasmuch as the said transportation service thus performed

and rendered by the said relator consisted of operations within
312 the said States of Massachusetts, New Jersey and Pennsylvania respectively, they consisted of and inhered in the exercise of franchises granted by those states respectively to corporations created by and domiciled within the said states, respectively, which were thus exercised by relator under and in pursuance of contracts of and for leases of, and contracts of and for trackage rights upon and over railroads there situate, together with the franchise to maintain and operate the same, granted, remised and accorded by the said corporations created by said respective states to the said relator, and exercised and enjoyed by the said relator in and under authority of the rights of its respective lessors and under and in pursuance of and subject unto the burdens imposed and regulations prescribed by the public acts and laws of the said States of Massachusetts, New Jersey and Pennsylvania respectively.

That in and by the exercise and performance of the functions thus employed by the said relator in the respective States of Massachusetts, New Jersey and Pennsylvania the only such function which it thus exercised under authority of the State of New York was that of its corporate existence, capacity and powers, the tax whereon or wherefor is no part of the tax here in question.

That the said franchise thus exercised by the said relator in the respective States of Massachusetts, New Jersey and Pennsylvania in and about and in respect of the there operation of its trains and transportation of persons and property were solely those granted and accorded by and under authority of the said respective states wherein the said operations were carried on and conducted, and were altogether and only subject unto regulations prescribed and pro-
313 mulgated by authority of those respective states and by authority of the United States, and not at all by authority of the State of New York.

That if and so far as it was within the province and power of the State, as distinguished from the United States, to impose or exact burdens upon or to prescribe regulations for and concerning the exercise by relator of the said franchises of railroad maintenance, train operation and transportation of persons and property, the province and power thereof solely inhered in and pertained to the said respective States of Massachusetts, New Jersey or Pennsylvania wherein the said respective railroad was situate and the said franchises were exercised, and not in or to the said State of New York.

That in and about the said relator's train operations and transportation of persons and property upon and over its said operated lines of railroad in the said respective States of New York, Massachusetts, New Jersey and Pennsylvania, respectively, in obedience to the requirements of the laws of the United States respecting through transportation from one state to another of carload commodities without reloading or breaking of bulk, and otherwise in conformity with the methods generally observed and followed by common carrier railroad transportation companies within the United States, in the time last preceding and within the said tax year, large numbers of relator's cars of various kinds were from day to day transferred and delivered

from relator, and its said operated lines of railroad, in the respective States of New York, Massachusetts, New Jersey and Pennsylvania, to, and upon the railroads of and operated by, other common carrier railroad transportation companies foreign to and outside of the State of New York, whereby a large average number of relator's cars, consisting of more or less frequently changing individual cars,
314 were continuously and at any and all times out of the State of New York, and out of the possession, custody and use of the said relator, and in the meantime transferred and delivered, more or less frequently from one to another common carrier railroad transportation corporation, and by them employed outside of the State of New York in and about their mutual and respective transportation business, foreign to and entirely dissociated from the business of the said relator, and in such wise as rendered it impossible for the relator to know, be informed or make proof, what, if any, of the said cars, and the extent to which all or any thereof were employed in transportation business solely within or domestic to any state, or in transportation business between or among the several states, or between the United States and countries or dominions foreign thereto; all of which said employment was under authority of and in the exercise of franchises respectively granted by the respective State in which the respective portion of transportation service was performed and carried on, and none whereof were granted by the State of New York.

That all and singular the service performed and business carried on and conducted by the means and in the use of relator's said cars, as well in the instances of operation thereof by the said foreign corporations as also in the instances of the operation thereof by relator, as and when carried on and conducted within the bounds of either such respective state other than New York were thus rendered, carried on and conducted under and subject unto the public regulation in that behalf prescribed, and under the authority and protection in that behalf provided and afforded in and by and in pursuance of the public acts of the respective state within whose territorial bounds
315 each respective portion thereof transpired and occurred, save and except only as and wherein the said service and business were subject unto and governed by the constitution, laws and administration of the United States.

That subject only unto such exception of Federal control each such State other than the State of New York had and exercised the exclusive province of prescribing in and by its public acts all and singular the burdens and regulations which the portions of the said service and business conducted within its territorial limits should be subject unto; and it was not within the province of the State of New York to impose other or further burden or regulation upon or concerning either intra-state, interstate or foreign commerce or any part thereof carried on or conducted within the bounds of such other state even though such service was performed or such business was carried on and conducted by relator corporation created by and having its domicil in the State of New York, for that any and either such imposition of regulation or burden contravened the provisions of the Constitution of the United States in that it denied full faith and credit to

the public acts of such other state; deprived relator of the equal protection of the laws of the State of New York; deprived relator of the equal protection of the laws of each such other State; oppressed the local commerce of and thus and otherwise derogated from and inveighed against the dignity and sovereignty of each such other State; transcended the power of the jurisdiction of the State of New York, in and by imposition of its tax burdens upon property, business and avocation respectively having their situs outside the State of New York and therein constituted the taking of the property of relator without due process of law, and, oppressed the privilege, occu-
316 pation and business of interstate and foreign commerce in manner aforesaid exercised, carried on and conducted by relator in each of the respective States other than New York in which its said cars were as aforesaid operated and employed.

That the capital of the said relator invested and employed in the average number of the cars of the relator in manner aforesaid absent from and employed outside of the State of New York in and during the franchise tax year ending October 31, 1903, was in excess of the sum of $19,817,142.24, which said sum stood in such relation to the meantime total capital of said relator that in and by inclusion thereof as subject unto the franchise tax to be computed upon the basis of the relator's capital employed within the State of New York, the said franchise tax was augmented and enlarged in and by the sum of $13,864.48.

That the said Comptroller of the State of New York in and about the imposition and laying of the said franchise tax upon and against the said relator to be computed upon the basis of the capital of the said relator employed within the State of New York during the said tax year, and the said respective courts in and about their respective final orders and judgments of affirmance of the said tax, imposed and sustained the same computed upon the basis of and including all of the cars of the said relator, the large average numbers whereof were in manner aforesaid absent from and employed in state and interstate and foreign commerce outside of the State of New York.

And the said petitioners further respectfully show unto the Court and complain that in the said record and proceedings had in the above entitled action (Taxes of A. D. 1903), and also in the rendition of the final order and judgment in the same cause, in the Supreme Court of the State of New York, sitting in Albany County,
317 Third Judicial Department, at the Appellate Division, November Term thereof, A. D. 1905, to wit: November 14, 1905, as also in the final order and judgment of the Court of Appeals of the State of New York, to which last mentioned court the said cause was appealed by said petitioners, being the highest court of law and equity in said state, and the highest such court in which a decision could be had in such cause, to wit; on January 23d, A. D. 1906, affirming on appeal the said final order and judgment of the Supreme Court of the State of New York, in the said cause between the said The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, petitioners and plaintiffs in error, and the said Otto Kelsey, as Comptroller of the State of New

York, respondent, and defendant in error, in each which Supreme Court and Court of Appeals, was drawn in question the validity of a statute of said state, and the validity of an authority exercised by the said Comptroller under said state, on the grounds that (1) they constituted a burden upon and regulation of commerce among the several states as carried on and conducted by the said relator and were thus repugnant to the commerce clause Article 1, Section 8, of the Constitution of the United States; (2) they impair the obligations of contracts of and with the said relator and were thus repugnant to Article 1, Section 10 of the Constitution of the United States; (3) they deprive the said relator of its property and property rights without due process of law and deny to it the equal protection of the laws, and were thus repugnant to the provisions of the fourteenth amendment of the Constitution of the United States, and (4) they deny and refuse to give full faith and credit to the public acts of such other respective states wherein relator's said cars were as aforesaid employed,
318 and were therein violative of Article 4, Section 1, of the Constitution of the United States, and the decision, final order and judgment of each thereof, the said Supreme Court and the said Court of Appeals, *was* in favor of such their validity; and that the said decision, final order and judgment of affirmance of the said Court of Appeals of the State of New York, together with the record and proceedings in said cause now remain in the said Court of Appeals of the State of New York before the justices thereof; in all whereof manifest error hath happened to the prejudice and damage of the said relator, The New York Central and Hudson River Railroad Company.

Wherefore, the said The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, petitioners and plaintiffs in error, pray for the allowance of a writ of error, and for such other and further orders and process as may cause the record and proceedings aforesaid, with all things concerning the same, to be sent to the Supreme Court of the United States, that upon final hearing hereof the said error be corrected, and such other and further proceeding be ordered and had as according to law should be done.

And your petitioners will ever pray.

Dated January 24th, 1906.

IRA A. PLACE,
Attorney for Petitioners, Plaintiffs in Error.

Room 417, Grand Central Station, Borough of Manhattan, New York City, N. Y.

THOMAS EMERY, *Of Counsel.*

319 STATE OF NEW YORK, *County of New York, ss:*

Edward L. Rossiter, being duly sworn, says, that he is an officer of The New York Central and Hudson River Railroad Company the petitioner herein, to wit, the Treasurer thereof; that the foregoing petition is true to the best of his knowledge and belief.

E. L. ROSSITER.

Sworn to before me this 24th day of January, 1906.
GEO. T. BROWN,
Notary Public, Westchester County.

Certificate filed in N. Y. County.

Allowed this 31 day of January, 1906.
EDGAR M. CULLEN,
Chief Judge of the Court of Appeals of the State of New York.

320 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Petition for Writ of Error. (Tax of 1903.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y.

321 United States Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant,
against
OTTO KELSEY, as Comptroller, etc., Respondent.

(Tax of 1903.)

Know all men by these presents, That we, The People of the State of New York *ex rel.* The New York Central and Hudson River Railroad Company, as principal, and the National Surety Company having an office and principal place of business at #346 Broadway, Borough of Manhattan, City of New York, as surety, are held and firmly bound unto Otto Kelsey, as Comptroller, etc., above-named, in the sum of Five hundred ($500.) Dollars to be paid to the said Otto Kelsey, as Comptroller, etc., his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 24th day of January, 1906.

Whereas, the above-named Appellant has sued out a Writ of Error to the United States Supreme Court to reverse the judgment in the above entitled case by the Court of Appeals of the State of New York.

Now, therefore, the condition of this obligation is such that if the above-named Appellant shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void otherwise to remain in full force and virtue.

[CORPORATE SEAL.]
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By W. H. NEWMAN, *President.*

Attest:
[L. S.] D. W. PARDEE, *Secretary.*

NATIONAL SURETY COMPANY,
By JOEL RATHBONE, *Res. Vice-President.*

Attest:
RICHARD U. MORIARTY, *Res. Asst.-Secretary.*

322 STATE OF NEW YORK, *County of New York, ss:*

On the 24th day of January in the year 1906, before me personally came William H. Newman, to me known, who being by me duly sworn did depose and say, that he resides in the City of New York; that he is the President of The New York Central and Hudson River Railroad Company, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority of the Board of Directors of said Corporation, and that he signed his name thereto by like authority.

[SEAL.] ALBERT B. QUENCER,
Notary Public, N. Y. County, N. Y. (No. 1).

323 STATE OF NEW YORK, *County of New York, ss:*

On this 24th day of Jan. 1906, before me personally appeared Joel Rathbone. Res. Vice-President of the National Surety Company, with whom I am personally acquainted, who being by me duly sworn, said that he resides in the County of New York; that he is the Res. Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Res. Vice-President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720 of New York Session Laws of 1893. And the said Joel Rathbone further said that he is acquainted with Richard U. Moriarty, and knows him to be the Res. Asst. Secretary of said Company; that the signature of the said Richard Moriarty, subscribed to the said instrument is in the genuine handwriting of the said Richard U. Moriarty, and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Joel Rathbone, Res. Vice-President.

MOLLIE SCHOENBRUN,
Notary Public for the County of N. Y., No. 347.

Certificate filed in Kings, Westchester, Richmond & Queens Counties.

Copy of By-Law.

Be it Remembered, That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following By-Law was adopted:

"ARTICLE XIII. SEC. 1.—*Signatures Required.*—All bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, shall be signed by the President, the Vice

"President, the Second Vice-President, a Resident Vice-President, or "an attorney in fact, and, except when signed by an attorney in "fact, shall have the seal of the Company affixed thereto, duly at- "tested by the Secretary, an Assistant Secretary or a Resident Assist- "ant Secretary. The Vice-President, Second Vice-President and "Resident Vice-Presidents shall each have authority to sign such in- "struments whether the President be absent or incapacitated or not; "and the Assistant Secretaries and Resident Assistant Secretaries "shall each have authority to seal and attest such instruments, "whether the Secretary be absent or incapacitated or not. All such "instruments executed as herein provided shall be as binding upon "the Company as if the same were signed by the President, duly "sealed and attested by the Secretary."

STATE OF NEW YORK, *County of New York, ss:*

I, Richard U. Moriarty, Res. Asst. Secretary of the National Surety Company, have compared the foregoing copy of By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original By-Law.

Given under my hand and seal of the Company this 24 day of Jan. 1906.

[L. S.] RICHARD U. MORIARTY,
Res. Ass't Secretary.

Approved by
EDGAR M. CULLEN,
Chief Judge of the Court of Appeals.

324 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Copy. Undertaking. (Tax of 1903.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y.

325 The original of the foregoing supersedeas bond was lodged with the Clerk of the Court of Appeals of the State of New York, on February 2nd, 1906, and the following endorsement made thereon: Bond. Filed February 2nd, 1906—W. H. Shankland, Clerk of the Court of Appeals.

326 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of New York, possessors of the return and record in the action in which The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company are Plaintiffs, and Otto Kelsey, as Comptroller of the State of New York, is Defendand, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the Court of Appeals of the State of New York, wherein final judgment upon return from the Supreme Court of the State of New York was rendered January 23d, 1906, that being the highest Court of law and equity of the said State in which a decision could be had in the suit or action between The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, and Otto Kelsey, as Comptroller of the State of New York, Defendant in Error, and which is now before you or some of you in said Court; wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the great damage of the said, The New York Central and Hudson River Railroad Company, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do
327 command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the said Supreme Court, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of February in the year of our Lord one thousand nine hundred and six, and of our Independence the one hundred and thirtieth.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

W. S. DOOLITTLE,
Clerk of the United States Circuit Court
for the Northern District of New York.

Allowed by
EDGAR M. CULLEN,
Chief Judge of the Court of Appeals
of the State of New York.

328 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Writ of Error. (Tax of 1903.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y.

329 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Otto Kelsey, as Comptroller of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Court of Appeals of the State of New York, wherein The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 31 day of Jan'y in the year of our Lord one thousand nine hundred and six.

EDGAR M. CULLEN,
Chief Judge of the Court of Appeals of the State of New York.

330 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Citation. (Tax of 1903.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y. Due service of a copy of within citation is admitted this 5th day of February, 1906. Julius M. Mayer, Att'y for Def't in Error.

331 Court of Appeals of New York, on Appeal from the A
Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Rel
THE NEW YORK CENTRAL AND HUDSON RIVER RAILRO
PANY, Plaintiffs in Error,

vs.

OTTO KELSEY, as Comptroller of the State of New Yo

(Tax of 1903.)

Papers on Appeal.

Ira A. Place, attorney for relator and appellant.
Julius M. Mayer, Attorney-General, attorney for respondent

STATE OF NEW YORK:

Court of Appeals, Clerk's Office.

To the Judges of the United States Supreme Court:

The return of the judges of the Court of Appeals of the New York, in pursuance to the writ of error in the case People of the State of New York, upon the relation of The N Central and Hudson River Railroad Company, appellant, Kelsey, as Comptroller of the State of New York, respondent of 1903, is contained in the papers and proceedings hereto

In witness whereof I have hereunto set my hand and af official seal at the city of Albany this 2nd day of February,

[Seal Court of Appeals, State of New York.]

W. H. SHANKLAND,
Clerk of the Court of Appeals o
the State of New

Endorsed on cover: File No. 20,089. New York cou peals. Term No. 587. The People of the State of New Yo the relation of The New York Central & Hudson River Company, plaintiff in error, *vs.* Otto Kelsey, as comptroll State of New York. Filed February 7th, 1906. File No